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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

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In re RICHARD O. BERTOLI

Petitioner,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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127 pp

Questions Presented

1. Did the Third Circuit properly refuse to issue a writ of mandamus to disqualify the trial judge after the judge showed his personal bias in numerous ways throughout the criminal proceedings, referring to himself as being involved in "the fog of battle" and trying to "view the level battlefield," making numerous rulings favoring the government, placing onerous restrictions on Petitioner's ability to subpoena witnesses and indicating that he viewed the charges against Petitioner as extremely serious, for which a heavy sentence was appropriate.

2. Should a judge be disqualified for making numerous biased rulings against a criminal defendant after he was personally attacked by that same defendant before an indictment had been handed down.

List of Parties

The parties in this case are Richard O. Bertoli and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Richard O. Bertoli prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The order of the Third Circuit appealed from (Appendix, infra, 1a) is unreported. An earlier decision of the District Court in the underlying criminal case (*United States v. Eisenberg, Bertoli and Cannistraro*, Cr. Ind. No. 89-218 (D.N.J. 1989) is reported at 734 F. Supp. 1137 (D.N.J. 199) and is found at 27a-97a of the Appendix. Other orders and rulings of the district court in the underlying criminal action are unreported and are reproduced in the appendix at 2a-97a.

STATEMENT OF JURISDICTION

The order of the Court of Appeals denying the writ of mandamus was entered on April 16, 1993. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1). The district court had jurisdiction over the underlying criminal prosecution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 455 of Title 28:

§ 455. Disqualification of justice, judge, or magistrate.

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he serve as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding,

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should informed himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interest of his spouse and minor children residing in the household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pre-trial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only in the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provision of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other that an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

STATEMENT OF THE CASE

This case involves outrageous personal bias by a judge in a criminal action, as revealed by numerous comments, orders and rulings over a period of three years. In view of the pervasive appearance of impartiality throughout the proceedings, various motions for disqualification were made. The judge refused to disqualify himself and the Third Circuit rejected two mandamus petitions requesting his removal, although there is no question that the judge's personal bias destroys any pretence of impartiality in this serious criminal proceeding. This Court has recently granted certiorari in a parallel situation, ***Liteky v. United States***, Dkt. No. 92-6921 (*cert. granted*, May 24, 1993). This case involves far more blatant evidence of judicial bias and appearance of impartiality than that found in the *Liteky* case. This Court should either grant certiorari in this case and set it for argument with *Liteky* or at the least hold the case until this Court decides the issue of whether a judge can be disqualified on the basis of matters arising out of the course of judicial proceedings and what the standard should be to justify removal.

The procedural history of the case is lengthy, but a brief summary will suffice. On September 29, 1989, a superseding indictment was filed, charging Petitioner with various RICO and securities offenses relating largely, but not exclusively, to a practice in the securities industry known as "front running" or "scalping".[1] The defendants, both individually and jointly, thereafter filed several motions, requesting discovery, dismissal of the indictment, and other relief. Two rounds of depositions were taken in the Cayman Islands at the government's request.

At an earlier time, in April of 1990, Petitioner Bertoli filed a Petition for Mandamus, seeking to disqualify the district judge presiding over the case. The basis for the initial mandamus petition was the fact that in 1987, Petitioner Bertoli had written an uncomplimentary letter to Judge Alfred J. Lechner, Jr. because of his actions with respect to another criminal case then pending before him. *At the time Petitioner Bertoli was himself not under any criminal indictment.* Petitioner's letter criticized Judge Lechner for the extremely harsh sentence that he had imposed against a colleague of Petitioner, one Richard Cannistraro. The original November, 1987 letter was followed by other letters also complaining about the sentence, one to Justice Thurgood Marshall and others to various Senators, Congressmen and ethics committees.

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[1] In frontrunning, a securities firm or its employees purchase a stock it intends soon to recommended to the investing public.

Thereafter, in November, 1989, Petitioner Bertoli was himself indicted. The case was assigned to Judge Lechner. After the judge made a series of procedural rulings against Petitioner, a motion for recusal was made in March, 1990, in part because of the bias shown with respect to the procedural rulings and in part because of the claim that the letters relating to the Cannistraro sentencing had to have created such animosity between Petitioner and Judge Lechner that his impartiality reasonably could be brought into question in the pending criminal proceedings.

Judge Lechner denied the recusal motion in a decision March 22, 1990 (27a-97a). In that decision, the Judge noted that he appeared to view himself as a combatant in a adversarial situation. ". . it is necessary to address most, if not all of the contentions -- factual and legal -- *to pierce through the fog of battle in order to view the level battlefield itself*." (27a)(emphasis added). Judge Lechner held that the original letters written by Petitioner were part of a scheme conceived of by him to lay the basis for a later disqualification motion if Petitioner was ever indicted in the future. "A reasonable person could reasonably conclude . . [that certain comments by Bertoli on a wiretap show] a plan by Bertoli to attempt to ensure I would not preside over any future criminal matter in which he was involved." (42a). The opinion went on to justify in minute detail every single ruling that the judge had made. In addition, the opinion consistently challenged the truth of statements made by Petitioner, despite the government's failure to contest them (see e.g. 38a-39a).

A petition for mandamus was then filed in the Third Circuit to disqualify Judge Lechner. That petition was denied. Thereafter numerous pretrial rulings were made by the trial court, in which in almost every instance the court ruled against Petitioner's position or that of his codefendants.

Petitioner Bertoli was previously represented by private counsel. However, counsel has since been discharged, and he therefore proceeds pro se.[2] His codefendant, Richard Cannistraro was previously represented by Michael Pollack, Esq. The district judge, however, disqualified Pollack and appointed the Federal Defender to represent Cannistraro. See *United States v. Cannistraro*, 794 F.Supp. 1313 (D.N.J. 1992). Cannistraro has declined to cooperate with appointed counsel and proceeded pro se. He recently entered into a plea bargain with the government leaving Petitioner as the only defendant now awaiting trial on the charges.

Recently, further rulings were made by the Judge that precipitated still another motion for recusal.

On September 30, 1992, Petitioner Bertoli requested trial subpoenas from the Clerk of the Court. The Clerk said that subpoenas would be issued to a pro se litigant only with the permission of the district judge's deputy clerk. The clerk returned after an apparent call to chambers, and told Bertoli that "the judge said if you want subpoenas, you must file a motion."

Petitioner memorialized these events in his letter to the court of October 15, 1992. (See Exhibit C to Petition for Mandamus to Third Circuit). In that letter he also asserted there was no authority upon which the Clerk could refuse to issue trial subpoenas under Fed.R.Crim.P. 17(a). Petitioner further objected that the requirement that he file a motion would disclose to the government his witnesses and his theory of defense.

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[2] The district judge has required prior counsel to remain in the case on a stand-by basis. Counsel later moved in the Third Circuit to be relieved of that responsibility. See Dkt. No. 92-5182. The Third Circuit denied the request. The issue received considerable attention in the legal press, See National Law Journal May 24, 1993, p. 3.

On October 20, 1992, the district judge sent a copy of Petitioner's letter to the government, and published its own letter. In that letter, the court asserted its right to limit the introduction of evidence. It recounted that Bertoli had previously requested twenty-four pre-trial subpoenas duces tecum, but had not responded to the court's subsequent order requiring Bertoli to show the necessity and relevance of each document sought. The court complained of Bertoli's supposed "penchant for excess" in his motion practice, although it supported that accusation only by an unadorned reference to the number of motions filed and their length (See Exhibit D to Petition for Mandamus to Third Circuit). And it quoted the stated concerns of Cannistraro that Bertoli's participation in the trial would substantially increase its length (*Id.*).

In the same letter, the court proposed that, with respect to each of the 50 trial subpoenas duces tecum Bertoli requested, Petitioner provide a factually detailed statement with respect to each document sought explaining (1) precisely how the document is evidentiary and relevant, (2) precisely why the document is not otherwise reasonably procurable by the exercise of due diligence and the efforts taken to otherwise procure the document, (3) precisely why Bertoli cannot properly present his case at trial in the absence of the document and (4) precisely why the request for the document is a good faith application and not a fishing expedition.

> To the extent Bertoli's request for fifty trial subpoenas relates to individuals pursuant to Fed.R.Crim.P. 17(a), Bertoli must provide a factually detailed statement with respect to each individual sought explaining (1) precisely how the testimony of the individual is evidentiary and relevant, (2) precisely why Bertoli cannot properly present his case at trial in the absence of the individual's testimony and (3) precisely why the request for the individual is a good faith application and not merely a request to prolong

the trial or compile cumulative testimonial evidence.

In the same letter, the court "proposed" that the Government use separate Assistant U.S. Attorneys to process motions filed by Bertoli regarding the subpoena, to meet Bertoli's concern that the prosecutors not learn his defense strategy.

Bertoli responded to the Court's October 20, 1992 letter with his own, dated October 23, 1992, in which he objected that the procedure demanded by the court was "patently unfair" (Exhibit E, to Petition for Mandamus).

The matter of the subpoenas was revisited at the court appearance of November 5, 1992 (Exhibit F, to Petition for Mandamus). The government conceded it "has not found anything on point that would support directly what your Honor proposed in that letter" (Exhibit F at 20). The court asserted its belief it did have such authority, but invited further comments (*Id.*).

On November 10, 1992, the government wrote to the court, agreeing that "Rule 17 does not require a defendant to make any threshold showing prior to obtaining or issuing subpoenas unless the defendant is indigent or unless the defendant desires the early production of documents pursuant to Rule 17(c)" (Exhibit H to Petition for Mandamus). The government thus advised the court that should it impose any requirement that the defendants justify its trial subpoenas "an appellate issue (either after trial or through a petition for a writ of mandamus) would almost certainly arise" (*Id.*). The government then proposed a schedule for the defendants to serve their subpoenas duces tecum, and provided a draft of a cover letter which it asserted the defendants should be required to include with its subpoenas (*Id.*).

On November 12, 1992, the court provided Mr. Bertoli a draft of a proposed letter for the defendants to include with any subpoena he might serve (Exhibit I to Petition for Mandamus). The two page, single-spaced letter summarized the charges, and explained the "fraudulent schemes" supposedly committed by the defendants, as well as Bertoli's supposed involvement in a conspiracy to obstruct justice. The letter invited subpoenaed parties to contact the defendant or the United States Attorney's office, should they have "any questions concerning the charges in this case, or should you want a copy of the indictment." It further advised that motions to quash, if any, should be filed by January 4, 1993.

At a court appearance on the same date, Bertoli reiterated his objections to the letter (Appendix B at 2a et seq.). Bertoli explained that he needed to subpoena many people because several different stocks were in issue, and with respect to each he needed to call "two of the market makers ..., two retail brokers ... two IPO customers ..., two after market customers ..., the transfer agents ... market letter writers [and] two management employees (*Id.* at 16a). He also expressed a need to introduce documents from the 12 market makers for each stock (*Id.* at 17a). Bertoli estimated he would call some 100 defense witnesses (*Id.* at 17a). He added that his request for subpoenas could hardly be considered excessive, as he had issued "one subpoena for every 20 the Government issued" and the government had subpoenaed some 300,000 pages of documents (*Id.* at 23a).

Addressing the court's and government's concern that trial might be delayed unless a pre-trial schedule were created to address motions to quash, Bertoli said he would "have no difficulty" to "allow the people, if they wish, to come in early to quash subpoenas" (*Id.* at 23a). The court accepted the government's and Bertoli's suggestion for early scheduling of motions to quash document subpoenas, and left open the question of subpoenas for testimony (*Id.* at 24a).

Bertoli reiterated his objection to the proposed letter in correspondence to the court dated November 19, 1992 (Appendix K to Petition for Mandamus). He objected on several grounds, asserting: (1) the court has no power to require such a letter; (2) the letter would violate his Fifth And Sixth Amendment rights; (3) the letter would ultimately disclose his theory of defense (i.e. because subpoenaed parties would be invited to call the government); and (4) the letter would "encourage motions to quash and avoid compliance by the witness". Bertoli concluded by requesting the court to "allow this defendant to obtain and issue unfettered [Rule] 17(a) trial subpoenas for both witnesses and documents."

On December 3, 1992, Bertoli again wrote to the court, objecting that the court had not yet resolved the procedures under which he could obtain and issue subpoenas and that, in the interim, the government, since November 24th3, had been issuing trial subpoenas for a January 11, 1993 trial date (Exhibit L to Petition for Mandamus). Bertoli asked the court to render a decision shortly.

By letter dated December 7, 1992, the court provided a copy of the cover letter which "defendants will be required to enclose ... when serving a trial subpoena duces tecum pursuant to Fed.R.Crim.P. 17(a)." The court maintained in the cover letter that the "Subpoena Letter has been revised to reflect the concerns of Bertoli" (Appendix N).

The letter, written on the court's stationary, states:

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[3] The government, in its letter of December 22, 1992, acknowledged that it in fact had been serving trial supboenas since September 10, 1992 (Exhibit M).

7 December 1992

TO: The Recipient of A
Trial Subpoena Duces Tecum
From Richard Bertoli or
Richard Cannistraro

Re: United States v. Richard O. Bertoli and
Richard S. Cannistraro
Criminal Number 89-218 (AJL)
(D.N.J)

Dear Sir/Madam:

Enclosed along with this letter is a trial subpoena duces tecum to you from one of the defendants in the above captioned matter.

The Indictment in this criminal case charges defendants Richard Bertoli And Richard Cannistraro with racketeering, racketeering conspiracy, and conspiracy to commit securities fraud. It also charges defendant Bertoli with conspiracy to obstruct justice and with obstruction of justice. A third defendant, Leo Eisenberg, has plead guilty to racketeering charges.

Put simply, the defendants are charged with engaging in fraudulent schemes involving the trading of various securities, primarily through their association with the New York City brokerage firm of Monarch Funding Corp., and then attempting to cover-up and conceal their fraudulent activities. More specifically, the defendants are charged with engaging in fraudulent schemes designed to rig, or manipulate the prices of three securities, Liquidation Control Inc. ("LCI"), Toxic Waste Containment Inc. ("Toxic Waste"), and High Technology Capital Corp. ("High Tech"). According to the Indictment, the defendants took actions designed to raise and control the prices of these securities and to create a greater demand for these securities, in an effort to ensure that the defendants could sell their own positions in three securities at substantial profits. The LCI scheme is alleged to have occurred between October 1982 and November 1983. The Toxic Waste scheme is alleged to have occurred between December 1982 and October 1983. The High Tech scheme is alleged to have occurred between March 1983 and February 1984.

The defendants are also charged with buying the securities of Astrosystems, Inc. and Nature's Bounty, Inc. with the knowledge of, and in anticipation of, the issuance of favorable research reports, and then selling their securities once the dissemination of the research reports had caused the prices of the securities to raise. The Astrosystems scheme is alleged to have occurred between October 1982 and August 1983. The Nature's Bounty scheme is alleged to have occurred between December 1982 and March 1983.

Defendant Richard Bertoli is also charged with engaging in a conspiracy to obstruct justice by attempting to impede investigation by the SEC and federal grand juries, as well as two criminal trials, relating to the allegedly fraudulent securities trading activities of himself and others at Monarch. This conspiracy is alleged to have existed between March 1983 and January 1992.

Finally, the defendants are charged with engaging in a conspiracy to commit securities fraud in connection with the purchase and sale of Solar Age Manufacturing Corp. securities between May 1983 and October 1985.

Should you have any questions concerning the charges in this case, or should you want a copy of the Indictment, you may contact the defendant who issued the subpoena. A copy of the Indictment can also be obtained from Philip J. Selecky, deputy clerk of the court. Questions concerning the charges, however, should not be directed to Mr. Selecky or to the court.

Please note that the return date of the subpoena duces tecum issued to you is blank because no final trial date has been set. Trial is expected to begin in the Spring of 1993. If you intend to comply with the requested document production, you may turn over the responsive documents to the defendant prior to trial, but you are not required to do so. In this regard, if the defendant wants a Court order requiring pre-trial production of your documents, he will be required to file an appropriate motion under Rule 17(c) of the Federal Rules of Criminal Procedure and send a copy of his motion to you. This court will then rule on the motion.

If, on the other hand, you intend to file a motion to quash all or part of the subpoena, you must file your motion on or before 11 January 1993. The defendant will have one week from the date that your motion is filed to respond, and you will then have one week to file any rebuttal papers. Finally, if you believe that you need more time to file a motion, you should make this request in writing to the Court as soon as possible.

Thank you for your anticipated cooperation.

Very truly yours,

/s/

Alfred J. Lechner, Jr.,
U.S.D.J.

In a letter dated December 17, 1992, Bertoli stated his continuing objection to the subpoena letter, as well as to the cover letter's suggestion that it reflected "the concerns of Bertoli" (Appendix O to Petition for Mandamus). He reiterated his belief that the letter is "an unauthorized, and entirely unwarranted attempt to chill my Fifth and Sixth Amendment rights. That this is so is obvious from the fact that no similar requirement has been imposed on the government." Bertoli added:

> The legitimate purpose served by the letter is not apparent. It is no answer to say -- as the Court has said -- that the undersigned has engaged in excessive motion or subpoena practices. Beyond the fact that this is not so, the letter does not at all address this concern. Rather, it gratuitously informs subpoenaed parties, under the Court's signature, of the charges, invites calls to the undersigned or to the Deputy Clerk for copies of the indictment, and sets up a schedule for motions to quash.
>
> None of the foregoing information should be force-fed to recipients of defense subpoenas. Virtually all of the parties I intend to subpoena are, or work for, entities with their own legal departments, and which are quite able to read and act upon Rule 17(c)'s provisions relating to motions to quash. Had the Court been legitimately motivated by a desire to control motion practice relating to the subpoenas, it need only have asked the parties to include a motion schedule on the face of the subpoena, but the Court's decision to require the letter only on defense subpoenas belies any such purpose.

Bertoli concluded the letter by maintaining that the court's one-sided imposition on the defendants of such an unauthorized letter "provides additional and, indeed conclusive, support for my belief that both the appearance and the fact of impartiality and fairness have been compromised in this case." Bertoli therefore moved, "pursuant to 28 U.S.C. § 455 and other applicable law, that the Court be disqualified" (Exhibit O).

Bertoli's objections to the letter and his request that the district judge be disqualified were rejected by the court at the appearance of January 12, 1993 (Appendix B, 3a et seq.)

Petitioner then filed a petition for mandamus with the Third Circuit. That court denied the petition by order dated April 18, 1993 (1a).[4]

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[4] During the pendency of the mandamus petition in the Third Circuit, certain unusual events occurred, raising the specter of *ex parte* contact between the court and the government, and prompting a supplemental letter by Petitioner Bertoli to the Third Circuit, dated March 1, 1993 and accepted for filing in the Third Circuit.

These events concerned a letter sent by the government to Judge Lechner, dated February 18, 1993, asking Judge Lechner whether it was still his intention to require Bertoli to include the subpoena cover letter which was the subject of Bertoli's mandamus petition. The government's purported reason for making the inquiry was entirely illogical, and appeared to be an effort to give Judge Lechner an "out" and to avoid an unfavorable ruling on mandamus. Judge Lechner, in an equally odd response, dated February 23, 1993, removed the cover letter requirement.

As Petitioner Bertoli observed in his letter of March 1, 1993, the court's letter removing the subpoena cover letter requirement mooted that part of his mandamus petition addressed to the subpoena cover

The underlying criminal action has proceeded with trial scheduled to begin on June 1, 1993. The trial is expected to last three to four months. At the same time this Petition for Certiorari is being filed, an application will be made to the Court for a stay of the pending criminal proceedings. The Third Circuit's refusal to disqualify an obviously biased judge, all the proceedings may have to be repeated, especially if this Court eventually establishes a standard for disqualification in the *Liteky* case that would affect situations such as that present here.

REASONS FOR GRANTING THE WRIT

This court has just granted certiorari on the issue whether a judge can be disqualified on the basis of matters arising out of the course of judicial proceedings and what the standard should be to justify removal, *Liteky v. United States*, Dkt. No. 92-6921 (*cert. granted*, May 24, 1993). This case involves precisely the same issue, but involving a judge whose impartiality is far more questionable than the judge in the *Liteky* case. Indeed the record in this case reveals a judge who saw himself as a combatant, "in the fog of battle" trying to "view the level battlefield." The judge had to be effected by the earlier uncomplimentary letters sent by Petitioner before any criminal actions had been brought against him. The attitude of hostility revealed by the judge in the subpoena letter destroys any pretence of impartiality in this case. This Court should either accept this case for review or at the least hold the current petition until the *Liteky* case is decided.

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letter, but enhanced that part of the mandamus petition seeking Judge Lechner's disqualification.

I.

THE THIRD CIRCUIT SHOULD HAVE ISSUED THE WRIT OF MANDAMUS TO REQUIRE REASSIGNMENT OF THIS CASE TO A DIFFERENT DISTRICT JUDGE

The district court's actions throughout the proceeding, culminating in the requirement that Petitioner include the subpoena cover letter with each of his subpoenas duces tecum, shows such personal bias and animosity that the judge should have been disqualified. This letter, supported by no precedent beyond the court's own whim, recites in onerous tones the racketeering charges lodged against the defendants, and invites further inquiry and motions to quash. When such an abuse of authority that appears to favor the government so strongly is shown (e.g, by not requiring a similar letter for government subpoenas), the judge's disqualification is mandated.

The appropriateness of the writ of mandamus to require the district judge's disqualification is unquestionable. On two recent occasions the Third Circuit has addressed the circumstances under which the Writ of Mandamus may issue, and has disqualified the assigned district court judge for comments and rulings far less biased than that displayed here. *In re School Asbestos Litigation*, 977 F.2d 764 (3d Cir. 1992); *Haines v. Liggett Group*, 975 F.2d 81 (3d Cir. 1992). *In re School Asbestos Litigation* reiterates that the writ should be limited to "extraordinary" circumstances, but must be applied with "[s]ome flexibility" if it is to serve its proper purpose as a "safety valve ... in the final judgment rule" 977 F.2d at 773.

In *Haines*, the Third Circuit alluded to this Court's decision in *Kerr v. United States District Court*, 426 U.S. 394 (1976), which established "two prerequisites to the issuance of a writ: (1) that petitioner have no other 'adequate means to attain the [desired] relief', and (2) that petitioner meet its burden of showing that its right to the writ is clear and indisputable," 975 F.2d at 89, quoting Kerr, 426 U.S. at 403.

In re Asbestos Litigation granted a writ of mandamus both to correct an erroneous procedural ruling, and also to require the court's disqualification for an appearance of impartiality. There, a nationwide products liability class action was brought against numerous defendants in connection with asbestos in school buildings. As relevant here, the controversy leading to the mandamus proceedings concerned two matters. First, the district judge attended a conference of asbestos experts sponsored by plaintiffs with money the judge had authorized from a litigation escrow fund. The conference was weighted toward plaintiffs' position, and the judge's expenses were defrayed by the sponsors.

Before determining whether the district judge should have recused himself, the court considered whether the question presented was amenable to mandamus review, and found that it was. 977 F.2d at 770. ("mandamus is a proper means to force a district judge to disqualify himself or herself under 28 U.S.C. § 455"). The court then addressed the merits, describing the appropriate inquiry as "whether a reasonable person, knowing all the acknowledged circumstances, might question the district judge's continued impartiality." 977 F.2d at 781. In focusing on the appearance of partiality, rather than partiality in fact, § 455 distinguishes itself from 28 U.S.C. § 144, which concerns actual judicial bias. This distinction helps differentiate the purposes of the two disqualification provisions, and supports the court's holding that § 455 violations are amenable to pre-judgment review.

Reviewing the totality of the facts surrounding the district judge's attendance at the conference, the Third Circuit was "convinced that a reasonable person might question Judge Kelly's ability to remain impartial ..." and that the judge's disqualification was therefore necessary. 977 F.2d at 782.

The dispute in *Haines* concerned the district judge's review of a magistrate judge's discovery order regarding assertedly privileged documents. Petitioner/defendant tobacco companies made two arguments in support of mandamus. First, they claimed that the district judge had wrongly considered evidence not before the magistrate judge whose decision he was reviewing. Second, they asserted that the district judge wrongly used highly inflammatory rhetoric in his decision, thereby compromising the appearance of fairness and requiring his disqualification.

Turning to the question of disqualification, the Court revisited an issue it had addressed in *Cipollone v. Liggett Group, Inc.*, 822 F.2d 335, 347 (3d Cir. 1987), where a prior disqualification request had been rejected. The factual basis for the new disqualification motion lay in the judge's introductory remarks to his opinion reviewing the magistrate's discovery order which included, among other questionable statements, these words:

> As the following facts disclose, despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation.

975 F.2d at 97.

The Third Circuit reiterated the need for judges to maintain the appearance of fairness, and reaffirmed its own supervisory authority to assure that they do:

> The right to trial by an impartial judge "is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). To fulfill this requirement -- and to avoid both bias and the appearance of bias -- this court has supervisory authority to order cases reassigned to another district court judge. *Lewis v. Curtis*, 671 F.2d 779, 789 (3d Cir.), cert. denied, 459 U.S. 880 (1982). Therein we stated:

> Impartiality and the appearance of impartiality in a judicial officer are the sine qua non of the American legal system. In Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968), the United States Supreme Court stated: "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

The Third Circuit acknowledged that the district judge in *Haines* was "a distinguished member of the federal judiciary" and was capable of "discharging judicial duties free from bias or prejudice." 975 F.2d at 98. However,

> that is not the test. It is not our subjective impressions of his impartiality gleaned after reviewing his decisions these many years; rather, the polestar is "[i]mpartiality and the appearance of impartiality."

Id. Finding that the appearance of impartiality had been compromised by the district judge's remarks, the Third Circuit required that the case be reassigned to a different judge. *Id*. Cf. *Lewis v. Curtis*, 671 F.2d 779 (3d Cir. 1982) (after determining that the district judge abused his discretion in refusing to grant plaintiff's motion to amend his complaint, and upon review of judge's intemperate statements at a hearing, court remands the case for assignment to another judge).

Applying the principles addressed in *Haines* and *In re Asbestos Litigation*, the Third Circuit should have ordered similar relief here. It cannot be the rule that a trial judge should be disqualified for making hostile remarks about or to a civil defendant that might reasonably question her impartiality, but she can say whatever she wants about a criminal defendant without similar relief being granted.

Judge Lechner's imposition of the cover letter was an act far exceeding his statutory or supervisory power and showed such partiality for the government's position that it required his disqualification. Of course, a judge's error of law, standing alone, will not require disqualification. *Cipollone v. Liggett Group, Inc.*, 822 F.2d at 347 (3d Cir. 1987). Certainly, a judge may be wrong without appearing to be biased. The district judge's actions in this case, however, go beyond mere error, and evidence bias for the government and against Petitioner.

Specifically, the cover letter was imposed on the defendants alone; the government was exempt. While no party -- neither the government nor the defendants -- should be required to use such a cover letter, in fact there was no reason -- other than bias -- for the district judge to have imposed the cover letter only on the defendants. In his letter of October 20, 1992, the district judge complained that Bertoli had previously sought to issue 24 subpoenas but did not respond when the court required that he separately justify each one. He complained as well about the aggressiveness of Bertoli's motion practice. Yet the court never pointed to a single subpoena which had been issued in bad faith and, as Bertoli himself pointed out, the government, in the related SEC civil case, had served many more subpoenas than had he.

In the end, the judge's stated reason for requiring the cover letter was to provide for an orderly pre-trial determination of motions to quash. Yet had scheduling been the judge's primarily motivation, he would have required the cover letter to be annexed to government subpoenas as well.

Additionally, the summary of the charges contained in the cover letter had no conceivable purpose other than to prejudice the defendants, by suggesting they are evil persons, and also by encouraging further inquiry and motions to quash. Noteworthy too is that most subpoenaed parties (or parties to be subpoenaed) in this case either are corporations or employees of corporations, or government agencies. Such persons and entities hardly needed the court to explain to them the underlying charges, or to otherwise explain their right to move to quash an improper subpoena.

The judge's apparent animus against the defendants is evident as well in his initially proposed cover letter, which required the defendants (but not the government) to provide painstaking detail in support of each of their subpoenas for both witnesses and documents. Thus, the defendants would have been required to demonstrate that each was relevant and noncumulative, that each document was not available elsewhere, and that each was not interposed as a "fishing expedition". Once again, this was a one-sided effort to impose onerous and prejudicial conditions on the defendants' efforts to defend themselves, even as the government could proceed without restraint.

Of course, the district judge's bias against the defendants comes as no surprise, as his Honor had pre-judged the case. Defendant Cannistraro had previously been sentenced before the same judge for precisely the same conduct which constitutes many of the predicate acts of the instant RICO charges. The judge could not hide his hatred of Cannistraro at sentencing:

> The distinctions between you and somebody going in to take money out of a bank is the absence of a weapon. That is where the distinctions end. From point of fact, you are no different than the armed thief ...
>
> You demonstrated no shame. Whatever you wanted to do, you did. The bottom line was avarice ...

> This is not a heart wrenching decision for me to make. This is not a close call. You deserve to go to prison and you shall...

(Transcript of November 2, 1987 at 45-48). Given these comments, no reasonable person would believe the court a neutral arbiter of the myriad issues which have arisen in this case, including those concerning the subpoena cover letter which revealed the court's biased attitude.

CONCLUSION

For all the foregoing reasons, this Court should grant the writ of certiorari.

Dated: May 27, 1993

Respectfully submitted,

Richard O Bertoli

RICHARD O. BERTOLI
Defendant pro se
42 Biltmore Avenue
Rye, New York 10580

Appendix A

Third Circuit Order
Denying Petiion for
Writ of Mandamus

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 93-5098

UNITED STATES

VS

RICHARD O. BERTOLI AND RICHARD S. CANNISTRARO (PETITIONERS)

THE HONORABLE ALFRED J. LECHNER, JR., NOMINAL RESPONDENT

(RELATED TO D.N.J. CRIM. NO. 88-000218)

Present: STAPLETON, NYGAARD and SEITZ, CIRCUIT JUDGES

Submitted are:

(1) Petitioner's petition for a writ of mandamus, pursuant to Rule 21, Federal Rules of Appellate Procedure; and

(2) Respondent's letter; and

(3) Petitioner's letter.

Respectfully,

Clerk

ORDER

The foregoing Petiioner is Denied.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: April 16, 1993

Appendix B,

Transcript of Proceddings
January 12, 1993
Denying Motion for Recusal

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CRIMINAL NO.

UNITED STATES OF AMERICA,

-v-

January 12,1993

RICHARD CANNISTRARO and
RICHARD BERTOLI

Defendants.

BEFORE:

HONORABLE ALFRED J. LECHNER, JR.,
UNITED STATES DISTRICT COURT JUDGE

January 12, 1993

THE COURT: May I have your appearances, please?

MR. FIETKIEWICZ: John Fietkiewicz and David Rosenfeld for the United States.

MR CANNISTRARO: Richard Cannistraro, pro se.

MR BERTOLI: Richard Bertoli, pro se.

THE COURT: All right.

MR. KAUFMAN: Ethan Kaufman of Podvey, Sachs the appointed standby counsel for Mr. Bertoli.

THE COURT: Thank you.

We're here this morning for a status conference, initially because of the letter I received from the Government and a follow-up letter I received from Mr. Bertoli.

Go ahead, please.

MR. FIETKIEWICZ: Judge, if I may, Government did request a status conference on the Cayman Islands proceedings, but there is one other issue that seems to have arisen that I would like to address with your Honor's permission and that's the issue of subpoenas by Mr. Bertoli.

THE COURT: Go ahead. Fine.

MR. FIETKIEWICZ: It seems over the last couple of weeks, the United States has received several letters from Mr. Bertoli that seem to imply that either the government is misserving or improperly serving trial subpoenas and/or that the Court, by its ruling with respect to Mr. Bertoli, is somehow favoring the Government over Mr.
Bertoli. Your Honor, this is not an issue in the Government's opinion. It's been addressed over and over, but just for THE record, I'd like to raise several points in an attempt tp put it to rest and get this thing moving.

As far as the Government's conduct, the Government has been serving trial subpoenas. It has been doing it properly under Rule 17.

THE COURT: What's the return date? We don't have a trial date yet.

MR FIETKIEWICZ: Judge, what the return date was was January 11 up until January 11.

After it became clear that January 11 is not the trial date, we have been serving the subpoenas without a trial date and a explanatory letter simply saying that it's likely, best guess of thew Government, is that it's going to go in the spring. That certainly may be wrong.

We have no, contrary to what Mr. Bertoli says, no knowledge that is going to go in the spring. However, the Government does have an obligation to attempt to get documents and to be ready whenever this case goes trial.

Consequently, we're serving the subpoenas. The parties don't have to comply with those subpoenas. There is no intent, there is no representation that somehow the party has to produce these subpoenas on a particular day. The Government has not abused Rule 17 and has not done anything to violate Rule 17.

It has not misrepresented anything to the subpoena recipients and unless your Honor tells us otherwise, the Government's view its that it can go ahead and serve subpoenas and, indeed, has to, to insure whenever this case goes to trial, it's ready to go to trial. If we didn't have documents, Mr. Bertoli would be complaining 30 days before trial that he doesn't have a full exhibit list.

The other suggestion, Judge, if there's a problem with the return date, simply set an arbitrary date we can both use, for example, May 1st, May 15.

THE COURT: Use for what purpose?

MR. FIETKIEWICZ: Of at least serving the subpoenas if Mr. Bertoli has a problem with serving subpoenas without a date.

The only point I wanted to make, Judge, is that Rule 17, other than compelling pretrial production, which the Government has not tried to do, is not required, on its face, Court permission.

As far as Mr. Bertoli's subpoenas, the second prong of what he addresses to the Court, his right of compulsory process has not been restricted in any way by your Honor. Although your Honor did raise the possibility of a procedure whereby Mr. Bertoli had to apply for subpoenas, your Honor didn't adopt that procedure.

All your Honor told Mr. Bertoli to do was to enclose a letter, an informational letter which basically told the parties if you want to come apply with the subpoena before hand, you can give it to Mr. Bertoli. If you don't want to, you can wait to trial. If you want to move to quash, you can do it by a certain date.

There is no restriction on Mr. Bertoli's right to serve those subpoenas and his letter seemed to imply that there is a grave legal issue here and his right to process has been fettered unreasonably by your Honor.

It seems to the Government that Mr. Bertoli can serve these subpoenas. He should do so. He should do so forthwith so that your Honor's concern that the trial is not unreasonably delayed wouldn't come to fruition by delaying of the service of these subpoenas.

The Government has proposed, your Honor, back in November, that your Honor set a date by which Mr. Bertoli should serve all the subpoenas he says he wants to serve. Your Honor did not adopt that, but the Government requests that your Honor reconsider that.

There must be some attempt to put this case on track, so to speak, and get it moving, because as your Honor saw, the subpoenas Mr. Bertoli was planning tom serve last spring, I don't know, but it seems to the Government that it's going to prompt motions to quash.

Now, obviously, Mr. Bertoli can't be held to not being able to serve the subpoenas if he doesn't serve them by that date, but he should be put in notice that if he doesn't serve the subpoenas by a certain date, the trial is not going to be delayed while he attempts to gather evidence. That, your Honor, you can do.

You can control your proceedings and the Government's view if you have struck a balance to allow Mr. Bertoli the right to serve whoever he wants, but to at least try to set reasonable schedules so that on the day of trial or during trial, the Court is not bombarded with motions to quash. It seems to me it's not a complicated issue. This is a tempest in a tea pot, but it should be brought to a head and simply resolved one way or another.

THE COURT: All right.

I was going to address that issue second, but since you brought it up now, Mr. Bertoli, I'll hear you. Go ahead.

MR. BERTOLI: First, your Honor, on two occasions--

THE COURT: May I interrupt you?

I want to note the presence of Miss Codey here as well.

Thank you.

Go ahead.

MR. BERTOLI: First your Honor, on two separate occasions, the last one being December 30, I attempted to pick up blank subpoenas from the Clerk's office and was denied the opportunity of even picking up blank subpoenas.

THE COURT: You wrote a letter to me saying it was December 31st.

MR. BERTOLI: I apologize. If I said December 31st, then it was December 31st.

THE COURT: I knew nothing about that, Mr. Bertoli, until I received your letter. I wasn't here on December 31st.

MR. BERTOLI: All I know, your Honor, is I was here. I went to the Clerk's office. The Clerk went presumably to your Clerk's office and the response came back that if I wanted subpoenas, I have to take it up at the next hearing.

THE COURT: No one in my chambers was here the 31st.

MR. BERTOLI: That's the comment I got back and that's why I documented it with a letter and I still don't have blank subpoenas.

THE COURT: Nobody was here on the 31st, that was New Year's Eve.

MR. BERTOLI: If your Honor is saying I may go to the Clerk's office and pick up blank subpoenas, I will do so today.

THE COURT: Go ahead.

MR. BERTOLI: Now, second issue, your Honor, is as you have stated here today, there is no trial date. Any subpoenas issued without a trial date is a 17(c) subpoena. It is not a 17(a) subpoena.

In order to issue a 17(c) subpoena, it requires an order from the court, the very same order that was denied me several months back by this Court where I was not allowed to issue 17(c) subpoenas. The Government--

THE COURT: That was the opinion I wrote last spring?

MR. BERTOLI: That's correct.

THE COURT: That's when you wanted to ask the Department of Defense for every document concerning waste dump sites?

MR. BERTOLI: That happens to be an issue in this case.

THE COURT: Not every waste site in this country is an issue.

MR. BERTOLI: The totality of it is, your Honor.

THE COURT: No, it's not.

MR. BERTOLI: The totality tells you the size of the market and this administration, through their efforts, wanted to hide. The newspapers now clearly say that to clean up the defense sites will take more money than Star Wars. And the Government has turned around and also said there was no market.

MR. FIETKIEWICZ: Judge Lechner --

THE COURT: Sit down.

Go ahead.

MR. BERTOLI: Now with respect to the subpoenas, perhaps, the Government can explain to us, I have one in front of me right now which was dated December 9, 1992. in the section that says a date and time of the trial, it says "January 11, 1993 at 9 a.m."

It says, "The case in which you are subpoenaed to appear may not be heard the exact date and time mentioned in the subpoena. Kindly hold yourself in readiness, but do not appear until the time and date has been confirmed by a letter or telephone call from this office."

What is it for? It happens to be my wife's credit card accounts up to this date from 1987. I would like to know how the Government thinks that my wife's charge accounts are relevant to this case. This is the type of subpoena that they have been issuing --

THE COURT: Excuse me, excuse me, Mr. Bertoli. We're not going to rule on individual subpoenas today, all right? So save your fire for a later date.

MR. BERTOLI: My position is clear on it. I believe these are 17(c) subpoenas, they require an order of the Court and I think they have been violating willfully the rules of the Court and something should be done about it.

THE COURT: Let's assume that's true, your argument is true. How does that hurt you? How does that hurt you?

MR. BERTOLI: How would that hurt me?

THE COURT: Isn't that more directed to the individual, the recipient of the subpoena than it is you?

MR. BERTOLI: Yes, your Honor, it intimidates the people that received the subpoenas. If they are --

THE COURT: Mr. Bertoli, you don't have a horse in this race.

Move on to the next issue.

MR. BERTOLI: Your Honor, the next issue is I hadmade a statement to the Court, I would like the Court to reconsider the recusal of your Honor based upon not only the appearance of prejudice but actual prejudice.

THE COURT: Denied.

Appendix C,

Transcript of Proceddings
November 12, 1992
Relating to Trial Subpoenas

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CRIMINAL NO. 89-218

TRANSCRIPT OF PROCEEDINGS

UNITED STATES OF AMERICA, :

-v-
November 12, 1992

RICHARD CANNISTRARO and :
RICHARD BERTOLI, Newark, New Jersey
:
Defendants.
x

BEFORE:

HONORABLE ALFRED J. LECHNER, JR.,
UNITED STATES DISTRICT COURT

November 12, 1992

THE COURT: Good morning.

Please, be seated.

Appearances, please.

MR. FIETKIEWICZ: John Fietkiewicz and David Rosenfield for the United States.

MR. CANNISTRARO: Richard Cannistraro, pro se.

MR. BERTOLI: Richard Bertoli, pro se.

THE COURT: All right.

I see Miss. Codey and Mr. Pollack are present.

Where is Miss Tolomeo?

MR. BERTOLI: I don't know, your Honor.

THE COURT: All right.

The purpose of this morning was to talk about a bail hearing for Mr. Cannistraro and also I want to talk about what has developed down in the Cayman Islands.

I guess we should handle the bail application first.

MR. FIETKIEWICZ: Judge, since your Honor has accepted Mr. Cannistraro's representation of indigency, the United States would not ask for any cash bail once Mr. Cannistraro gets out, but we ask your Honor to impose a reasonable and normal restrictions that your Honor would impose on any criminal defendant.

THE COURT: I'll hear you on this, Mr. Cannistraro.

office and push paperwork out as opposed to doing it long distance.

THE COURT: I'm not sure I have a problem with that.

Does the Government have any problem?

MR. FIETKIEWICZ: No, Judge.

THE COURT: That's fine.

MR. BERTOLI: Thank you, your Honor.

THE COURT: That's not a problem.

Now, look, with regard to the subpoenas, as I indicated before, whether they be for testimony or documents, what I'm concerned about is not so much the form I'm going to follow, but the result.

I don't want to be in a position where trial comes along and I've got to take huge numbers of hours out or we have a jury waiting in the wings, as it were, to handle motions to quash by what I think is fair to anticipate will be a significant number of people upon whom these subpoenas are served.

Now, the Government has suggested a procedure for the documents. I'm going to suggest that we follow that procedure for subpoenas with regard to testimony as well. It seems to me this is the benefit of everybody. If anybody is excluded, at least Mr. Cannistraro or Mr. Bertoli will know it and they'll have the opportunity to plan their trial strategy accordingly.

The same thing with regard to document production. I'll hear you folks on that point, whomever wants to speak.

Go ahead.

MR. BERTOLI: Your Honor, with respect to 17(a) trial subpoenas, I think the law is clear.

The Court cannot prevent the issuance of the subpoenas.

THE COURT: Well, I'm not sure I buy that, but just for the sake of argument, assume I accept what Mr. Fietkiewicz has submitted and I accept your point. Go ahead.

MR. BERTOLI: There is, in addition, no case that I have found and none that the Government has presented which will allow the Court to force a defendant into including a letter with the subpoenas to be issued. One, it's highly prejudicial.

THE COURT: How is it prejudicial?

MR. BERTOLI: Well, your Honor, what it states it's suggesting that the witness call the Government for assistance. It is encouraging a motion to quash.

THE COURT: I don't think it does either. If there is language you would like me to change, I'm certainly willing to talk to you about that.

MR. BERTOLI: You know, going further, what will happen is that the defendants' case is going to be revealed to the Government.

It should be noted that the Government refused to provide their witness list. The Court refused to order the witness list provided to the defendants in this instance.

THE COURT: Didn't the Government say they were going to give it to you? Didn't you say that?

MR. BERTOLI: No.

MR. FIETKIEWICZ: No, Judge.

THE COURT: That was the documents, I'm sorry. That's the documents.

MR. BERTOLI: So who their witness are today --

THE COURT: It's your position that you can get n unlimited number of these subpoenas and then call these people and I'd have to have a hearing for every person while the jury is sitting waiting?

MR. BERTOLI: No, your Honor.

As far as individual witnesses to testify, I will be calling witnesses, and I basically outlined and gave the Government and opportunity to see where we're coming from on the defendants' side. I do not think it's unreasonable to call two of the market makers for each stock, two retail brokers for each stock, two IPO customers for each stock, two after market customers for each stock, the transfer agents for each stock .

THE COURT: How many market letters writers?

MR. BERTOLI: There is at least one in each security, your Honor. In the case of Toxic Waste, there are seven.

THE COURT: Well, that's ten witnesses for each stock so far.

Gi ahead.

MR. BERTOLI: On top of that, we have --

THE COURT: How many stocks are there now, are we talking about?

MR. BERTOLI: We are talking a minimum of six. I don't know if there is more because I don't know at this time whether the Government is going -- intends to produce any kind of evidence with respect to other securities as well.

THE COURT: Now we are up to 60.

Go ahead.

MR. BERTOLI: The --

THE COURT: Maybe as many as 66, because you said there were seven.

MR. BERTOLI: That's correct. We have two management employees from each company.

THE COURT: Now we're between 70 to 76.

MR. BERTOLI: That's correct, your Honor.

Now, we go into basically document witnesses and that is necessary because each security had 12 different market makers.

The Government, apparently, intends to introduce only the documents from one market maker or perhaps two. I intend to introduce the documents from all 12 market makers, which will clearly show there was no market manipulation, the same way with the market makers.

I notice from the list the Government just provided yesterday that they say that there are 116 witnesses -- I want to make sure that number is accurate.

THE COURT: What list are you talking about?

MR. BERTOLI: 116 witnesses that appeared before the Grand Jury that have favorable information for me.

THE COURT: What list are you talking about?

MR. BERTOLI: The Government provided a list just recently, I received it only yesterday, and it list 116 witnesses where there is testimony before the Grand Jury or the SEC that they said may have favorable information in connection with this case.

Now, how many witnesses the Government intends, I note they skirted this issue because I don't think they want the Court to know the enormous problems with respect to this case. They haven't said they're only going to produce 50 witnesses. There is no way they can possibly prove their case with 50 witnesses. I suspect they'll be introducing 100 to 200 witnesses.

THE COURT: Now, you're telling me that your witnesses are between 82 and 88 in number?

MR. BERTOLI: Certainly, in the area of 100, your Honor.

THE COURT: One hundred witnesses.

How long do you think each witness would be on the stand on direct?

MR. BERTOLI: some of them would be very quick. For example, with respect to the market makers, I probably would not ask them 20 questions. They may be under cross-examination much longer because of obvious reasons.

THE COURT: I have 100 witnesses. Are we talking an average of half a day for each?

MR. BERTOLI: On mine, your Honor, probably true.

THE COURT: So your talking about 50 trial days on direct?

MR. BERTOLI: That's right.

THE COURT: What would you anticipate the cross on these folks to be?

MR. BERTOLI: I don't know, your Honor. The Government has been sitting with the information concerning all of these people for a long period of time. They may just pass on cross. I don't know what they would do on cross.

The testimony of these witnesses will be very difficult to refute on the basis of the Government. They're not bought and paid for witnesses, they're straight people who never had a problem in their life.

THE COURT: The Government has bought and paid for their witmwitnesses is that the --

MR. BERTOLI: The witnesses I believe the Government are going to be putting forth on this case, your Honor, are all sitting out, and I understand there is as many as 17 of them, that have all pled guilty, have track records in the securities industry that are not the best in the world and they're all sitting out, never having spent a day in jail pending this case.

THE COURT: So you're telling me somebody who's got a securities conviction who never spent a day in jail is not believable?

MR. BERTOLI: Well, I certainly think the jury will tend to take that into consideration in terms of credibility.

THE COURT: What about somebody with 77 convictions who's never spent a day in jail?

MR. BERTOLI: I would also think that goes into the credibility.

Recently a case in New York that was just thrown out because of that.

THE COURT: Mr. Fietkiewicz?

MR. FIETKIEWICZ: Your Honor, a few months ago I took over responsibility for this case. Since that time, the Government have been reviewing what happened prior to that time.

The decision was made that to avoid discovery disputes, the Government would tell the defendants the names of every witness who testified in the Grand Jury and every witness that we know of that testified before the SEC.

Hardly a witness list and hardly was it a list of witnesses who the Government believed provided exculpatory material.

The language of the letter was depending on your defense, you may find this testimony of these witnesses helpful.

Secondly, in the letter, the Government offered to make the rest of -- Mr. Bertoli has asked for documents that the Government has received since 1990. The Government's taken the position, and your Honor has agreed, that we don't have to turn them over.

The Government's determination was to avoid any needless disputes, that once our exhibit list was turned over, any other documents that are arguably relevant to this case and that are not Jencks, Giglio or privileged materials, would also be made available.

I guess this goes under the heading of you can't

win in this case when you try to be helpful, but this is just let's avoid this garbage, quite frankly, that's going on. I mean, that's all the letter said.

Judge, as far as the witnesses, much of what I think Mr. Bertoli is talking about, I recognize your Honor's concerns about trial, but we don't know whether these witnesses are going to move to quash or not, but there is still going to be a question during trial from the Government's and of whether that testimony happens to be relevant, whether that testimony happens to be admissible.

It's the Government's view if we're just talking about testimony solely for -- subpoenas solely for testimony, that in most cases your Honor will still, perhaps, want to wait until after seeing the Government's case before making a ruling on those subpoenas. Perhaps if there is a question of privilege or something like that, it can be certainly addressed ahead of time, but as far as the testimony, it would seem appropriate that the Court call upon Mr. Bertoli or Mr. Cannistraro during trial to proffer the nature of the testimony that's going to be given and then in light of what's gone before it in this courtroom, the Court can make that kind of decision.

This is the reason the Government proposed not being as strict as far as the time limits with the subpoenas for testimony as the subpoenas for documents.

THE COURT: Anything, Mr. Cannistraro?

MR. CANNISTRARO: Your Honor, I would like to know what list or letter both the Government and Mr. Bertoli are talking about. I've not received it.

MR. FIETKIEWICZ: It's been sent to Mr. Cannistraro.

THE COURT: I don't know either, Mr. Cannistraro.
I haven't seen it.

Well, maybe a way to handle this problem is to break after the Government's case and provide a certain number of days to handle these subpoenas in order tom avoid any inconvenience to the jury.

MR. FIETKIEWICZ: Your Honor, I think that would be appropriate as far as the subpoenas solely for testimony.

THE COURT: Maybe that will be a way of doing it.

MR. BERTOLI: Your Honor, with respect to the documents, if I may?

THE COURT: Yes.

MR. BERTOLI: I have no difficulty. In fact, would go along with the Government, as I tried the last time, to issue 17(c) S and allow the people, if they wish, to come in early to quash those subpoenas.

I believe all of the information is relevant to this case.

I've been in litigation quite a bit of time in my life time, your Honor, and although there have been a few instances where people move to quash, I never lost one.

When it comes to excess, which the Government keeps saying, in the civil case, your Honor, I issue one subpoena for every 20 the Government issued. Mr. Rosenfield in the month before he was transferred from the SEC to the U.S. Attorney's Office issued 25 subpoenas in the month of December alone.

So when it comes to excess, your Honor, they didn't wind up with 300,000 pages of documents because they issued one subpoena. Excess is not on my side, your Honor, and I don't think any court has ever accused me of excess.

Apparently, you're referring to an old situation in this court, your Honor. The only reason why that hearing went on a long period of time is the court knew 14 members of the SEC lied.

THE COURT: What are you talking about?

MR. BERTOLI: They're talking about excess. I had a hearing here many years ago, your Honor, that lasted 45 days on the hearing. It could have lasted two or three days, but 14 members of the Securities and Exchange Commission took the witness stand, one after the other, all testified, even with their own notes in front of them, that they did not remember a single thing about a three-hour meeting.

The Court seeing that, knowing that trained investigators and attorneys could not remember what took place in a three-hour meeting, even though confronted with their own notes, allowed it to continue to get to the facts. If that was excess, maybe that was excess, but it wasn't because of my doing.

THE COURT: Mr. Bertoli, we've got to get an arrangement here. I don't need an essay every time I ask you a question because life is finite. All I need to know when that hearing occurred or who it was in front of. I don't care about the background of it.

MR. BERTOLI: I'm sorry. It was in front of Judge Hague.

THE COURT: Fine. That's all I needed to know. It has nothing to do with this case, that's what I was trying to find out.

Then I'll take the Government's suggestion with the concurrence of Mr. Bertoli concerning the documents.

With regard to the testifying witnesses, I'll consider it and think about it and maybe what I'll do is what I suggested a few minutes ago, require their suppression motions, if there are going to be any motions to quash, rather, during a period of time after the Government's case and I'll advise the jury that we'll have a hiatus and handle it that way. But I'll about that a little bit more.

Is there anything else we have to talk about?

MR. BERTOLI: There is only one small item left, your Honor. The Government continues to talk about my one October letter to the Court as being gratuitous. The fact of the matter is it was sent because in the original discovery order of this Court, it required such a letter and that's the reason why I send it.

THE COURT: Okay.

MR. BERTOLI: They just failed to look at the old record.

MR. FIETKIEWICZ: Judge, may I just make one comment?

As your Honor knows, the discovery order says that 30 days before trial the Government is supposed to turn over a list of exhibits. Two weeks after that, the defendant is supposed to specify which, if any, documents he objects to, on grounds of authenticity and chain of custody. Obviously, that point has never ever been reached yet, but we're trying to work through that to put it ahead.

THE COURT: All right.

I'm going to prepare a draft of these letters, as I indicated earlier, to the Caymans and to the BOP. I'll send them out to everybody. I'll give you a date by which I'd like to hear your comments.

If I don't receive comments in that date, I'll assume you have none and, as indicated here this morning, there is no objection to either or both of the letters and I'll go at it.

Anything further?

MR. FIETKIEWICZ: Your Honor, the only other question is the Government suggested several other scheduling procedures.

Does your Honor want to wait on that pending a determination of when the Cayman Island depositions will take place?

THE COURT: My inclination is yes for the following reason: I don't want to set down a series of dates and requirements that may conflict with the efforts of the defendants to prepare and take those depositions. I mean, the Caymans would write back and say no, these are going to occur in December. Mr. Cannistraro may get out between now and then, they'd have to be working on that so I don't want to prejudice them and just to set down empty dates at this point I don't think would be wise.

I'm going to vacate that prior order that went out with regard to the documents, et cetera, indicating that we'll have another scheduling order. The one purpose was achieved, at least we got focus on it and now it can go from there.

Is there anything further then?

MR. FIETKIEWICZ: No, Judge.

THE COURT: What I want you to do is submit an order to me with regard to bail conditions for Mr. Cannistraro.

Thank you.

(Matter concluded.)

Appendix D

District Court Decision,
United States v. Eisenberg
March 12, 1990

Defendant Richard 0. Bertoli ("Bertoli") filed this motion pursuant to 28 U.S.C. 455(a) ("section 455(a)") and Rule 32 of the Federal Rules of Criminal Procedure ("Rule 32") for recusal because he asserts there may be a question of my impartiality as a result of comments he previously made about me and : may have received data about Bertoli while presiding over a prior case, United States v. Cannistraro, Crim. No. 87-193 (the "First Cannistraro Indictment"), involving co-defendant Richard S. Cannistraro ("Cannistraro"). Succinctly stated, Bertoli reacted to the sentence imposed in the First Cannistraro Indictment, a matter in which he was neither a party nor in any way involved, by forwarding to me a letter which a reasonable person would describe as unprovoked and nasty. Bertoli contends he mailed a letter of similar content to an Associate Justice of the Supreme Court with copies to other prominent people and several bar associations . Cannistraro also filed a motion for my recusal pursuant to section 455(a). Cannistraro contends I may have become aware of certain data concerning the instant indictment (the "Superseding Indictment), at the plea, detention and/or sentencing hearings during the First Cannistraro Indictment. Oral argument was held on 29 January 1990. For the reasons which follow, these motions are denied.[1]

Procedural History

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[1] This opinion is regrettably too long. However, it is necessary to address most, if not all, of the contentions -- factual or legal -- to pierce through the fog of battle in order to view the level battlefield itself.

Although the Superseding Indictment concerns three defendants and only six counts, the threshold procedural motions and supporting filings to date fill almost three feet of shelf space. Briefly stated, the following is an overview of what has transpired and what brings the court to these motions concerning recusal.

On 2 November 1989 counsel for Bertoli filed a motion for my recusal (the "Bertoli Recusal Motion").[2] The Government filed its opposition to the Bertoli Recusal Motion on 17 November 1989.[3] On 22 November 1989 Bertoli filed a Reply Brief in support of the recusal motion (the "Bertoli Reply Brief"). Tracing the path of Bertoli, on 27 November 1989 Cannistraro filed, pro se, a motion, dated 24 November 1989, for my recusal (the "Cannistraro Recusal Motion").[4] The Government filed its opposition to the Cannistraro Recusal Motion on 5 December 1989.[5] On 11 December 1989 Cannistraro submitted additional support for his recusal motion.[6]

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[2] Prior to filing the Bertoli Recusal Motion, Bertoli himself forwarded a letter with attachments to chambers demanding my recusal (the "Bertoli Recusal Letter"). Thereafter, Bertoli, through his attorney Franklin M. Sachs, Esq. ("Sachs"), filed on 2 November 1989 an Affidavit (the "2 November 1989 Sachs Aff.") and a brief and exhibits in support of the Bertoli Recusal Motion. On 3 November 1989 Bertoli filed a letter brief in further support of the Bertoli Recusal Motion (the "3 November 1989 Bertoli Letter Brief") and attached a copy of the transcript of the Sentencing Hearing on 2 November 1987 concerning the First Cannistraro Indictment. On 8 November 1989 Bertoli filed an Amended Brief and exhibits in support of the Bertoli Recusal Motion, dated 6 November 1989 (the "Bertoli Amended Brief"). On 8 November 1989 Bertoli filed a "short amendment" to his papers filed in support of the Bertoli Recusal Motion (the "Bertoli Short Amendment").

[3] The Government opposition papers include a Memorandum of Law in Opposition (the "Government Opposition to Bertoli") and Exhibits 1 through 16 which purportedly formed the basis for additional motions by Bertoli and Cannistraro. See, e.g.., footnotes 7 and 8, infra, and accompanying text.

On 14 December 1989 Bertoli filed a motion for discovery to obtain information in connection with his motion for recusal (the "Bertoli Recusal Discovery Motion"). The listing of categories of documents and data sought in the Bertoli Recusal Discovery Motion is extensive and is keyed to the Exhibits attached to the Government Opposition to Bertoli.[7] However, in large

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[4] In support of his recusal motion, Cannistraro filed a brief (the "Cannistraro Brief") on 27 November 1989. Cannistraro also "relies upon the motion and supporting documents submitted on behalf" of Bertoli in connection with the Bertoli Recusal Motion. Notice of Motion of Richard S. Cannistraro for an Order for the Recusal of Alfred J. Lechner, Jr. at 2.

[5] The Government opposition papers include a Memorandum of Law in Opposition.

[6] Although received on 11 December 1989, this submission from Cannistraro is a letter, dated 1 December 1989 and attached to the letter is a memorandum in support of recusal (the "Cannistraro Memorandum). The Cannistraro Memorandum is a collection of excerpts from other briefs submitted in connection with the First Cannistraro Indictment.

[7] The Bertoli Recusal Discovery Motion demands

"disclosure of the following evidence [sic] by the Government prior to any hearing on the Bertoli Recusal Motion:

1. Any and all tape recordings or transcripts of telephone conversations involving defendant Bertoli from January 1, 1975 to date which are in the Government's possession.

2. Any and all tape recordings or other transcripts of telephone conversations involving defendant Richard S. Cannistraro from January 1, 1975 to date which are in the Government's possession.

Defendant Cannistraro has given us his consent to seek such tapes and transcripts.

3. All files of any investigation by any governmental agency or office, including but not limited to the General Accounting Office, regarding the alleged use by Judges Stern and Lacey of the United States Marshalls Service for personal purposes.

4. All records and files relating to the alleged leak, or any investigation thereof by any governmental agency or office, of confidential information by Securities and Exchange Commission ("S.E.C.") employees to the press in January, 1976 regarding the grand jury investigation of defendant Bertoli and/or Executive Securities.

5. All records and files relating to any investigation conducted by any governmental agency or office, including but not limited to the S.E.C., of Harry L. Garmansky concerning the complaints made about Mr. Garmansky in Eeoli v. Goldstein, Civil Action No. 76-207.

6. All records and files possessed by any governmental agency or office, including the S.E.C. and the U.S. Attorneys Office, relating to investments in the name of Anna Graber.

7. All records and files relating to any investigation by any governmental agency or office of Jacob Graber concerning the complaints made against Mr. Graber in Bertoli v. Foreman of Grand Jury, Civil Action No. 76-286.

8. All records and files relating to the actions of the S.E.C. in investigating and auditing Executive Securities which are the subject of complaint in Bertoli v. Goldstein, Civil Action No. 76-207 and Bertoli v. Foreman of Grand Jury, Civil Action No. 76-286.

9. All records and files of the alleged leak, or any investigation any governmental agency or office, of false rumors by S.E.C. employees in 1975 regarding the alleged short position of Executive Securities with respect to IBM stock.

part these Exhibits are either letters, affidavits or complaints drafted and filed by Bertoli himself. Again in trace of Bertoli, Cannistraro filed on 18 December 1989 a motion, dated 14 December 1989, for disclosure of information concerning his motion for recusal (the "Cannistraro Recusal Discovery Motion").[8] While the

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10. All records and files of any investigation conducted by any governmental agency or office, including but not limited to the S.E.C., relating to defendant Bertoli's allegation that in September, 1975 an affidavit containing false statements was sworn to by Peter Quigley and submitted by Harry L. Garmansky to the Administrative Law Judge in charge of the S.E.C. hearing on Executive Securities.

11. All records and files of any investigation conducted by any government agency or office relating to the alleged perjury committed by Stanley Hecht, a former S.E.C. counsel.

12. All records and files relating to any governmental negotiations, including but not limited to negotiations involving Assistant United States Attorney Robert P. Warren, with Herbert Cannon.

13. All records and files of any investigation conducted by any governmental agency or office, including but not limited relating to the alleged perjury committed by Stanley Skubina in a hearing involving defendant Bertoli."

Id. at 1-3. Bertoli "reserve~d] his right, after receiving such discovery, to move before the Court for an evidentiary hearing on the issues raised by his recusal motion and for the right to subpoena witnesses a~ necessary for testimony at such hearing.n L~ at 3-4. The entire Bertoli Recusal Discovery Motion was denied by ~etter-Opinion and Order, dated 11 January 1990.

[8] The Cannistraro Recusal Discovery Motion demands "disclosure of the following evidence [sic] by the Government prior to any hearing on defendant Cannistraro's Motion for Recusal:

1. Any and all tape recordings or transcripts of telephone conversations involving defendant Bertoli from January 1, 1975 to date which are in the Government's

2. Any and all tape recordings or other transcripts of telephone conversations involving defendant Richard S. Cannistraro from January 1, 1975 to date which are in the Government's possession.

3. Any and all tape recordings or other transcripts of telephone conversations involving Carl Alan Key from January 1, 1975 to date which are in the government's [sic] possession.

4. All records and files in connection with the ex parte meetings of Goldsmith of the SEC with Judge Alfred [J.] Lechner[, Jr.] including but not limited to the ex parte
Goldstein dated February , 1988 addressed to Judge Lechner.

5. All records and files in connection with the ex parte meeting of Robert S. Warren with Judge Alfred [J.] Lechner[, Jr].

6. All records and files of any investigation conducted by any governmental agency or office, including but not limited to the Government's allegation that defendant Richard S. Cannistraro has: stated that "I (Schlichter) was one of the five people that Mr. Cannistraro would like to see killed." Detention Hearing September 24, 1987 at page 46. Detention Hearing September 24, 1987 at page 91. stated to Bennet Syms that if you don't cooperate, he would wind up dead." Detention Hearing September 24, 1987 at page 103. stated to Bennet Syms that "these
people were organized crime people." Detention Hearing September 24, 1987 at page 104. stated to Carl Alan Key that "he (Cannistraro) went down to the Caymen Islands with four people, one of them was Leo Eisenberg, and the other two were organized crime people." Detention Hearing September 24, 1987 at page 105."

Id. at 1-3. Cannistraro also made the same demand for an evidentiary hearing and to subpoena witnesses. The entire Cannistraro Recusal Discovery Motion was denied by Letter Opinion and Order, filed 11 January 1990.

listing of the categories of requested documents is extensive, the documents, if they exist, are largely unrelated to the Cannistraro Recusal Motion. As well, on 18 December 1989, Cannistraro submitted his reply brief to the Government opposition to his motion for recusal.

As noted, the Bertoli and Cannistraro Recusal Discovery Motions were denied in their entirety on 11 January 1990 by Letter-Opinion and Order of that date (the "11 January 1990 Letter-Opinion").[9] The

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[9] See notes 7 and 8, supra. Although Bertoli's statements and actions in the present litigation and his activities in past actions might support not only a charge of judge shopping but also such a conclusion by a reasonable person, a finding to that effect is not necessary to adjudicate the recusal motion. As will be discussed at length infra, the standard in a section 455(a) motion is whether a reasonable person knowing the facts might reasonably question a judge's impartiality. United States v. Martorano, 866 F.2d 62, 67 (3d Cir. 1989), cert. denied, 58 U.S.L.W. 3527 (1990).
Whether Bertoli is actually attempting to judge shop is not the issue in the case sub judice All that is needed to decide the issue is knowledge of the actions Bertoli took and the statements he made, the length of time between his accusations and the opening of this case, the negligible effect Bertoli's statements had on anyone to whom they were addressed and my decision not to respond his letters.

Bertoli, apparently upset with the sentencing in the First Cannistraro Indictment, sent some ill-considered letters to people who neither responded to nor took action on them. In matters before other judges he has done the same. He in no way claims the allegations in the letters are true. The incidents at issue are over two years old. Other than this opinion, I never responded to nor have I commented on Bertoli's conduct or his accusations.

These facts are in the record and are all that is necessary to decide this motion. Discovery as to whether Bertoli was actually judge shopping is unimportant. Such discovery would be burdensome, time consuming and unnecessary given the standards of section 455(a). The parties and the court would expend valuable resources next day counsel for Bertoli filed yet another motion on short notice for an order striking all Exhibits from the Government's Opposition to Bertoli and for me to recuse myself on the Bertoli Recusal Motion and reassign the motion to another judge. In support of these two motions Bertoli submitted the affidavit of Sachs, dated 12 January 1990 (the "12 January 1990 Sachs Aff.") and voluminous other documents. On 22 January 1990 the Government submitted a succinct letter in opposition to these motions.

During the course of the above-described motion practice, the Government filed on 6 November 1989 a motion in this case for leave to take foreign depositions and for the issuance of a request for foreign judicial assistance for discovery in the Caymen Islands together with supporting documentation (the "Government's Caymen Islands Discovery Motion"). On 14 November 1989 Sachs, counsel for Bertoli, suggested a delay of the decision on the Government's Caymen Islands Discovery Motion until after the Bertoli Recusal Motion was decided. 14 November 1989 Letter from Sachs (the "14 November 1989 Sachs Letter"). On 17 November 1989 Bertoli, through Sachs, filed his opposition to the Government's Caymen Islands Discovery Motion. On 22 November 1989 the

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on an issue that is only tangentially, if at all, related to the issue at hand. However, the circumstances here are not inconsistent with judge shopping and a district court should be aware of the possibility of creating undesirable prec-dents when that threat exists. See United States v. Dalfonso, 707 F.2d 757, 760-61 (3d Cir. 1983).

The Cannistraro Recusal Discovery Motion is as meritless as is the Bertoli motion. The documents requested by Cannistraro, if they exist, are irrelevant. Cannistraro's request at items 4 and 5 of his motion, see note 8, supra, have been dealt with previously, 11 January 1990 Letter-Opinion, and will be addressed briefly later in this Opinion. Succinctly stated, however, there were no ~ parte communications concerning Cannistraro.

Government filed its Reply. As described above, Bertoli then filed a series of additional motions which delayed argument on the Bertoli Recusal Motion. While all of this was pending and after Sachs requested a delay of the decision concerning the Government's Caymen Island Discovery Motion, Bertoli applied for and obtained, on an ex parte basis from the Grand Court of the Caymen Islands, an injunction prohibiting the Government from applying to the courts of the Caymen Islands for the discovery described in the Government's Caymen Island Discovery Motion. This ex parte injunction was applied for on 11 December 1989 and obtained on 4 January 1990. Sachs delivered a copy of these papers to the Government on 9 January 1990.[10] Sachs, however, did not deliver a copy of these papers to the court when he delivered them to the Office of the United States Attorney.

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[10] On 9 January 1990 Sachs delivered to the office of the United States Attorney "in accordance with an order of the Grand Court of the Caymen Islands dated January 4, 1990 and filed January 8, 1990 [the following documents]:

(1) Writ of Summons dated December 11, 1989;

(2) Ex Parte Summons for Interlocutory Injunction dated December 11, 1989;

(3) Affidavit of Franklin Sachs dated December 11, 1989;

(4) Second Affidavit of Franklin M. Sachs dated December 11, 1989;

(5) Affidavit of Franklin M. Sachs dated December 20, 1989;

(6) Order of Grand Court of the Caymen Islands restraining and enjoining the defendants [Richard R. Thornburg, Attorney General of the United States, Samuel A. Alito, United States Attorney for the District of New Jersey, Robert Warren, Assistant United States Attorney and David Rosenfield, Special Assistant United States Attorney] dated January 4, 1990; and

(7) Affidavit of Alistair MacDonald with exhibits dated January 5, 1990."

Sachs Letter to Samuel Alito, United States Attorney, dated 9 January 1990.

I was unaware of the application for or issuance of this injunction until I received a copy of the documentation from Assistant United States Attorney John M. Fietkiewicz via letter, dated 11 January 1990 (the "Fietkiewicz Letter"), advising me an order had been obtained on behalf of Bertoli, Eisenberg and Cannistraro, on an ex parte basis, restraining Attorney General Thornburg, United States Attorney Alito, Assistant United States Attorney Warren and Special Assistant United States Attorney Rosenfield "from making any application to the Grand Court of the Caymen Islands under the Evidence (Proceedings and other Jurisdictions) Order 1978, which denies the plaintiffs the right to challenge the application or any proceedings thereon in the Grand Court of the Caymen Islands." Fietkiewicz Letter. Shortly thereafter, I received a letter, dated 11 January 1990, from Sachs (the "11 January 1990 Sachs Letter") in response to the Fietkiewicz Letter. Sachs stated:

> I wanted the Court to understand that the reason that I had not provided the Court with a copy of that injunction was simply because the Court had indicated that it was not going to deal with any other matters until it had ruled on the pending recusal Motion. I do not want it to appear to the Court that we were in any way seeking to hide from the Court the action which we felt was essential to take in the Caymen Islands. To the contrary, we simply felt it inappropriate to file any further papers with Your Honor pending ruling on the motion for recusal.
>
> However, inasmuch as the Government has seen fit to informally provide Your Honor with the papers, I believe it is imperative to document the

> *file by making* them formally part of the record and I am therefore, this day, filing them with the Clerk's Office.

11 January 1990 Sachs Letter.

The comments in the above-quoted portion of the 11 January 1990 Sachs Letter are, to say the least, surprising. The concept of delaying decision on the Government Caymen Islands motion originated with Sachs. See 14 November 1989 Sachs Letter. With regard to Sachs' comments about "seeking to hide from the court the action which we felt was essential to take in the Caymen Islands," it is difficult to understand any other intent for his actions. This is especially so in light of the Government's Caymen Island Discovery Motion which was filed more than a month prior to the ex parte application by Sachs and to which Sachs not only filed opposition on behalf of Bertoli but, as mentioned, requested a delay in handling until the recusal motion had been decided.

It is likewise difficult to understand the meaning of the last sentence quoted from the 11 January 1990 Sachs Letter which stated that the "Government has seen fit to informally provide Your Honor with the papers" which Sachs filed and obtained on an ex Parte basis. Because Sachs had decided not to provide the court with a copy of these papers, which appear to have some relevance to the Government's Caymen Islands Discovery Motion, it is difficult to understand how or when I would have been apprised of this turn of events but for the Government forwarding a copy to me.

The ex Parte application and order are at best curious from a professional point of view. Indeed, the bona fides of the conduct of counsel in filing the Bertoli Recusal Motion, which are raised in the first instance by counsel to Bertoli in the 2 November 1989 Sachs

Affidavit ~ 5, in the Bertoli Reply Brief at 6,[11] **and again** at oral argument on 29 January 1990 (see Transcript of Oral Argument on 29 January 1990 (the "29 Jan. 1990 Tr. at _") at 11), are curious as well.[12]

As if the volume of Bertoli's submissions were not enough, his counsel submitted, just one business day before oral argument on the Bertoli motions, yet more paper. This time Bertoli submitted what his counsel contends were attachments to Bertoli's letter to Justice Thurgood Marshall, dated 3 November 1987 (the "Marshall Letter"). The Marshall Letter is annexed as an Exhibit to the 2 November 1989 Sachs Affidavit, Exhibit B to the Bertoli Amended Brief and is mentioned within Exhibit A to the 12 January 1990 Sachs Affidavit. Why this additional paper - to which there are no less than three previous references in Bertoli submissions -- is relevant or necessary is not explained.

An interesting fact which bears note is the absence of an affidavit or certification from either Bertoli or Cannistraro. The absence of such affidavit or certification is notable not only concerning their contention of impartiality but as well concerning even basic facts -- such as the Marshall Letter, and the other conduct of Bertoli which is now before the court. There is nothing to establish the Marshall Letter and attachments, if any, were in fact posted, as alleged. Nor is there a denial of other conduct on the part of Bertoli, as has been unquestionably established by the Government.[13] On 25 January 1990 Michael B. Pollack ("Pollack"), counsel for Cannistraro, filed a motion (the "Pollack Motion") on short notice which is duplicative of prior Cannistraro motions in that it requested an evidentiary hearing with regard to the recusal motion and for a reassignment of the Cannistraro Recusal Motion to another judge. This is the first appearance by Pollack on behalf of Cannistraro. Pollack argued the Cannistraro motions. The Pollack Motion makes certain allegations and characterizations which will be addressed later in this opinion.

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[11] The 2 November 1989 Sachs Affidavit states: "The motion of defendant Bertoli for an Order of Recusal under 18 U.S.C. 455(a) is made in good faith." Id. at 5. This representation is gratuitous and is not required pursuant to section 455. Compare 28 U.S.C. § 144. The Bertoli Reply Brief states: "Indeed, if counsel had believed that **the defendant** deliberately created the grounds upon which this recusal motion is based, the motion would not have been filed." Id. at 6.

[12] This is neither the moment nor the method by which to determine the bona fides of the conduct of counsel to Bertoli as they raise the issue concerning the recusal motion or to other applications filed in this court or elsewhere.

Facts as to Bertoli

On 29 September 1989 a grand jury returned the Superseding Indictment, which contains six counts, against Bertoli and co defendants Cannistraro and Leo M. Eisenberg ("Eisenberg"). The Superseding Indictment charges the defendants with racketeering, conspiracy and obstruction of justice. The Superseding Indictment was unsealed on 5 October 1989. As previously noted, Bertoli thereafter wrote a letter to me requesting my recusal "without formal motion by [his] attorney." Bertoli Recusal Letter. **This was followed** by the Bertoli Recusal Motion. The Bertoli Amended Brief in support of his motion contends that my impartiality might reasonably be questioned as a result of the formal complaints[14] previously registered by Mr. Bertoli."

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[13] See text at 20 to 24, infra, concerning Bertoli conduct as well as letter and affidavits submitted by Bertoli in other litigation commenced by him.

[14] As mentioned below, the so-called "formal complaints" were merely letters written by Bertoli to Justice Thurgood Marshall with copies to Senator Edward Kennedy, then Congressman Peter Rodino, and to the Ethics Committee of the American and New Jersey Bar Associations.

Bertoli Amended Brief at 3. The 3 November 1989 Bertoli Letter Brief contends I presided over the First Cannistraro Indictment in which Bertoli contends (i) I read a presentence report concerning Cannistraro and (ii) I "heard non evidentiary representations about the alleged criminal responsibility of other defendants," id. at 3, presumably including Bertoli.

The purported basis for recusal arises from Bertoli's reaction to the sentencing of Cannistraro on the First Cannistraro Indictment. In May of 1987 Cannistraro was indicted on charges of security fraud and obstruction of justice. It is contended Bertoli "assiduously followed the criminal proceedings against Cannistraro" in the First Cannistraro Indictment. Bertoli Amended Brief
In that indictment Cannistraro pleaded guilty to all counts without a plea agreement and was sentenced on 2 November 1987 to eight years imprisonment (his total exposure was fifty years). Bertoli contends he attended the Cannistraro sentencing.[15] Apparently, Bertoli thought "the sentence was incredibly harsh." 29 Jan. 1990 Tr. at 27. In addition, Bertoli claims he reviewed transcripts of the Cannistraro detention hearings held on 21 and 24 September 1987. Bertoli Amended Brief at 1.

On 2 November 1987 Bertoli wrote to chambers and expressed his displeasure with handing the First Cannistraro Indictment and called for my resignation. Bertoli Amended Brief, Exhibit A. The letter contained a warning that if I did not resign within thirty days, Bertoli would "refer this matter to the Judiciary

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[15] Although Bertoli asserts he was present for the sentencing of Cannistraro, I was not aware of his presence, if in fact he was present. In fact, the first time I was aware of being in the same room with Bertoli was when he was arraigned on the Superseding Indictment on 6 November 1989.

Committee and bar association for action." Id.[16] In the Marshall Letter, dated 3 November 1987, Bertoli referred to me in unflattering terms, requested a review of the sentencing of Cannistraro on the First Cannistraro Indictment and demanded that I receive a reprimand and be impeached. Bertoli Amended Brief, Exhibit B. It is contended a copy of the Marshall Letter was forwarded to the Ethics Committees for the American Bar Association, the New Jersey Bar Association, Senator Edward Kennedy and then Congressman Peter Rodino. Bertoli Amended Brief at 2. I did not respond to the communications from Bertoli.[17]

The Government submitted a transcript and the actual audio tape of a telephone conversation between Cannistraro and Bertoli (Government Opposition to Bertoli at 6 and Exhibit 1) which occurred in December 1987 during Cannistraro's incarceration on the First Indictment.[18] This conversation concerned, among other things, the Marshall Letter. The conversation, together with the Bertoli Recusal Letter and the Marshall Letter, is revealing. Bertoli and Cannistraro discussed the Marshall Letter in December 1987 and Bertoli expressed an interest in the effect of the letter on me:

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[16] The demand for resignation within a specified period of time appears to be the usual method of operation for Bertoli. He took the same tact concerning the removal of an Administrative Law Judge presiding over a hearing concerning Bertoli and a Bertoli company. See text at 23, infra.

[17] It appears all parties to whom this correspondence was forwarded have ignored Bertoli.

[18] It appears all non-privileged prisoner communications made from or received at the prison were recorded. Prisoners were apprised of the practice.

> Bertoli: ... my letter complaint on Lechner is in the mail today.
>
> Cannistraro: Okay.
> Bertoli: Ahh... the second the second paragraph I'll use (u/i). The second paragraph says Mr. [sic) Lechner has displayed a lack of judicial temperament and truly needs psychiatric help and analysis. He should love me for that.

Government Opposition to Bertoli at 6 and Exhibit A. The matter rested for two years without any further comment by Bertoli until he was named in the Superseding Indictment.

A reasonable person could reasonably conclude the comments exchanged between Bertoli and Cannistraro to which reference is made above are part of a plan by Bertoli to attempt to ensure I would not preside over any future criminal matter in which he was involved.[19] At least by the time of the First Cannistraro

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[19] The facts and circumstances giving rise to the Bertoli Recusal Motion appear to support a finding that Bertoli, since the time of the sentencing of Cannistraro on the First Cannistraro Indictment, had a calculated plan seeking to have me disqualified in the event Bertoli would be indicted in a case assigned to me. The Government has submitted evidence which suggests Bertoli has engaged in a similar course of conduct involving other judges and past proceedings. Bertoli has submitted nothing to contest his actual conduct or the filings he effected or the accuracy of the Government submissions concerning Federal Judges Frederick B. Lacey and Herbert Stern, Administrative Law Judge Ralph Tracy, U.S. Attorney Goldstein and a federal Grand Jury and its foreman. These facts appear to be beyond contest. However, a finding concerning why Bertoli did each of these things or his intent is not necessary.

Regardless of Bertoli's previous other conduct, as mentioned above, the Bertoli Recusal Motion must be denied because it is based exclusively upon Bertoli's own conduct. Bertoli

Indictment, it appears Bertoli was aware that he was a primary subject of a grand jury investigation which also concerned Eisenberg.[20]

It appears this is not the first occasion Bertoli, prior to being indicted, made unprovoked, exceptional allegations against federal judges with whom he had no prior dealing. From January 1976 through the Spring of 1977, a federal grand jury in New Jersey was investigating, among other matters, Bertoli's role in the collapse of his New York City brokerage firm, Executive Securities Corp. ("Executive

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has submitted no evidence of conduct, statements or even intimations by me which could possibly lead to a conclusion or even an inference that I had a preconceived opinion about Bertoli prior to the issuance of the Superseding Indictment Also, the facts of this case do not require recusal as a matter of public perception.

Bertoli's intent in filing this motion is irrelevant. The Bertoli and Cannistraro Discovery Motions were denied on this ground. I decline any invitation to find Bertoli's conduct amounted to a calculated plan to force my recusal because such a finding is unnecessary. Even absent an intent to coerce my recusal, Bertoli has presented no evidence in support of his position that I should disqualify myself from this case.

[20] In June of 1987 after the First Cannistraro Indictment, the Government filed a motion to stay discovery proceedings in a related civil case filed in the Southern District of New York, S.E.C. v. Monarch Fundina Corp.. et al., Civil No. 85-7072 (LBS). In support of that motion, the Government submitted an affidavit of Michael J. Cahill, Special Agent of the FBI, sworn to 17 June 1987 ("Cahill Aff."). The affidavit stated that:

> The other civil defendant in this action, Monarch, its principal owner, Leo Eisenberg, Richard Bertoli and Steven Cloies, plus others, are primary subjects of the criminal Investigation.

Government Opposition to Bertoli at Exhibit 2; Cahill Aff., at 4 (emphasis added).

Securities"). Bertoli was aware of the then pending grand jury investigation of Executive Securities, his status as a target of the investigation and the probability he would be a criminal defendant.

On 26 January 1976 Bertoli forwarded a letter to then United States Attorney Jonathan Goldstein. In this letter Bertoli referred to a grand jury conducting a criminal fraud investigation concerning Executive Securities as well as himself and advanced certain complaints and threatened legal action "against all individuals involved." Government Opposition to Bertoli, Exhibit 3. Shortly thereafter, in or about the first week of February 1976, Bertoli filed a verified complaint against United States Attorney Goldstein and his office (the "Goldstein Lawsuit"). Government Opposition to Bertoli, Exhibit 7, Verified Complaint.

Bertoli contended in the Goldstein Lawsuit that on or about 22 January 1976 United States Attorney Goldstein and his office developed a plan of harassment concerning Bertoli. Id., Verified Complaint at ~ 5. He also referred to the then pending Securities and Exchange Commission ("SEC") hearing concerning Executive Securities and referred to the SEC hearing as a "'kangaroo court' administrative hearing." Bertoli also attacked the administrative law judge, the Honorable Ralph Tracy, to whom the matter had been assigned. Id., Verified Complaint at ~ 8-16. Bertoli, in the Goldstein Lawsuit, made specific reference to the SEC attorney handling the matter at the hearing. Bertoli quoted the SEC attorney as stating "that he was close to Judge Lacey, Judge Stern[21] and U.S. Attorney Goldstein and that he [the SEC attorney] would use them to 'get [Bertoli]' if [he] did not stop making a fool out of [the SEC attorney] during the [SEC] administrative hearing." Id., Verified Complaint at 18.

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[21] **Judges Lacey and Stern were members of the court sitting in the District of New Jersey at the time. Judges Lacey and Stern have since retired and resigned from the bench.**

In the Goldstein Lawsuit, Bertoli demanded that United States Attorney Goldstein and his office be enjoined from violating Bertoli's rights, that they be disqualified from taking part in the SEC investigation concerning him and Executive Securities and that the grand jury which was investigating both him and Executive Securities be discharged.

On 17 February 1976, on the heels of the Goldstein Lawsuit, Bertoli filed yet another verified complaint, this time against the foreman of the grand jury and the grand jury investigating Executive Securities (the "(grand Jury Lawsuit"). Government opposition to Bertoli, Exhibit 8, Verified Complaint. In the Grand Jury Lawsuit Bertoli Made far ranging allegations concerning the SEC hearing with regard to Executive Securities and specifically alleged the SEC hearing was used as a cover-up to discredit him. Id., Verified Complaint at ~ 29. Bertoli also complained about the United States Attorney and his office and stated that the "Foreman [of the grand jury" must insist upon the disqualification of any prosecutor where there is any appearance of bias, prejudice or personal interest which could violate the due process rights of plaintiff." Id., Verified Complaint at 59. Bertoli demanded the issuance of an injunction against the foreman of the grand jury and the grand jury as a whole to prevent them from violating his rights and various federal laws, rules and regulations. Bertoli also demanded the disqualification of the foreman and the grand jury as a whole and the discharge of the grand jury with regard to the investigation of Executive Securities and Bertoli. On 23 April 1977 Bertoli wrote a letter to then United States Attorney General Griffin Bell, copying President Carter, other Government officials and the American and New Jersey Bar Associations. The letter "demanded] that United States District Court Judges Frederick Lacey and Lawrence [presumably Herbert] Stern be indicted." (the "Lacey/Stern Letter"). Government opposition to Bertoli, Exhibit 4. Bertoli advanced accusations against Judges Lacey and Stern which were unrelated to Bertoli in any way.

Placed among the 26 January 1976 letter to United States Attorney Goldstein threatening legal action, the Goldstein Lawsuit, the Grand Jury Lawsuit and the Lacey/Stern Letter, Bertoli sought the recusal of a judge in the matter in which the SEC filed an administrative proceeding against him and another individual in connection with the demise of Executive Securities. The matter was assigned to Administrative Law Judge Ralph Tracy who presided over an evidentiary hearing.

Bertoli demanded Judge Tracy disqualify himself asserting that the "[g]rounds for said disqualification are based upon the bias and prejudice of said judge." Government Opposition to Bertoli, Exhibit 5, Bertoli Affidavit, sworn to 7 April 1976, at ~ 2. Bertoli stated: "In the event of your failure to respond with [sic] ten days, I will have no choice but to move in the United States District Court: for your removal." Government Opposition to Bertoli, Exhibit 5; 7 April 1976 Letter to Judge Tracy (the "Tracy Removal Demand"). Apparently the motion was filed **because Judge Tracy** ruled against Bertoli on certain matters; the motion was denied.

Approximately two months after the Lacy/Stern Letter, Bertoli was indicted by a federal grand jury on seventy-seven counts relating to a securities fraud scheme. The indictment, however, was not assigned to either Judge Lacey or Judge Stern. The matter was assigned to another judge; Bertoli pled nolo contendere to all charges.

Facts as to Cannistraro

Although some facts with regard to Cannistraro have previously been set forth in this opinion, it is necessary to set forth not only facts bearing on the claims of Cannistraro in this matter, but, as well, with regard to

Cannistraro in connection with the First Cannistraro Indictment.

On 28 May 1987 Cannistraro was indicted in the First Cannistraro Indictment. This nine count indictment charged him with conspiracy to commit securities fraud, the creation and use of false nominee accounts in connection with the purchase and sale of securities, the creation and distribution of false misleading research reports, the interstate transportation of money obtained by fraud, mail fraud and obstruction of a grand jury investigation. At his arraignment on 12 June 1987, Cannistraro pleaded not guilty to all nine counts. However, on 21 September 1987, just before trial was scheduled to commence, Cannistraro entered a plea of guilty to all counts without benefit of a plea agreement with the Government.

On the day of his guilty plea, Cannistraro testified under oath At a hearing held pursuant to Rule 11 of the Federal Rules of Criminal Procedure. In addition to responding to questions from the Government, Cannistraro made a voluntary statement at the Rule 11 hearing. After his plea of guilty was accepted, a detention hearing was held. As a result of the detention hearing, the conditions of bail for Cannistraro were modified and tightened.[22]

At a 2 November 1987 sentencing hearing, Cannistraro was sentenced to a total of eight years in prison followed by five years probation. He was fined $330,000 and ordered to pay restitution in the amount of $394,947.00. A trustee was appointed to disburse the money to the victims of his fraud. Cannistraro filed his Notice of Appeal concerning sentencing and other matters on 13 November 1987.

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[22] For a detailed discussion of the bail hearing, see United States v. Cannistraro, 694 F.Supp. 62, 64-69 (D.N.J. 1988), aff'd in part and remanded, 871 F.2d 1210 (3d Cir. 1989).

On 6 April 1989 the Third Circuit rejected all of his challenges on appeal and affirmed with the exception of a technical challenge to the sentence which he contended was based upon statistics compiled by the Probation Department. The sentence was vacated and the matter remanded for resentencing. Cannistraro, 871 F.2d at 1217.[23]

Three weeks after the Circuit remanded the matter for resentencing and more than one and one-half years after the Rule 11 proceeding, the detention hearing and the sentencing, Cannistraro filed, on 24 April May 1989, a motion to withdraw his plea of guilty to each of the nine counts of the First Cannistraro Indictment. Cannistraro alleged ineffective assistance of counsel and argued there was an inadequate factual basis to accept his guilty plea. The attack on the plea continues up until this time and is running a parallel track with this, the Superseding Indictment.

As explained earlier, Cannistraro filed his recusal motion in this case on 27 November 1989 and contended generally that I should recuse myself because of my involvement in the First Cannistraro Indictment.[24] The first prong of the Pollock Motion contends I had ex parte communications with Barry Goldsmith ("Goldsmith"), Assistant Chief Litigation Counsel for the SEC during the pendency of the First Cannistraro Indictment. The Pollack Motion also contends I have personal knowledge of disputed evidentiary facts in connection with the recusal motion. The Pollack Motion attempts to bootstrap the second prong by indicating I shall be a necessary witness for the recusal motion because of communications with Goldsmith.

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[23] The Circuit expressly noted it had "no difficulty" with remanding the matter to me for resentencing. The Circuit explained: "Cannistraro has failed to show a substantial reason, other than dislike of the sentence imposed, which would require us to reassign the case on remand." 871 F.2d at 1217 n. 6.

[24] Specifically, Cannistraro, in his pro se brief, contends as follows:

> (1) Judge Lechner listened to the Assistant U.S. Attorney interrogate Defendant concerning many of the events to be contested in the instant case.
> (2) Judge Lechner read a PSI report that discussed many of the alleged actions and events to be contested in the instant case.

> (3) Judge Lechner was subjected to nonsupported prejudicial hearsay testimony at the September 24, 1987 detention hearing prejudicing Defendant.
>
> (4) Judge Lechner may have had numerous ex - parte communications during the postconviction process of the 1987 case with SEC lawyers and investigators who are the plaintiffs in a pending civil action against Defendant on the same charges as the instant case.
>
> (5) Judge Lechner was reversed by the Third Circuit concerning his sentencing of Defendant on the 1987 case.
>
> (6) Judge Lechner during the sentencing and post conviction hearings of the 1987 case has made comments which would indicate that he already believes that Defendant is guilty of many of the charges in the 1989 indictment prior to the start of trail [sic] or even pretrail [sic] motions.
>
> (7) Judge Lechner has heard testimony from Defendant's former trial attorney concerning their representation of privileged communications which relate to most of the events to be contested in the instant 1989 case.

Cannistraro Brief at 4-5 (emphasis added). Cannistraro has not identified any of the data to which he makes reference in items 1, 2, 3, 6 and 7 above other than by way of a general reference to the Rule 11 Hearing, the presentence report and the detention hearing. This was not corrected by Pollack.

The communications with Goldsmith concerned exclusively the appointment of a trustee in connection with the restitution assessed against Cannistraro at sentencing in the First Cannistraro Indictment. The letter to which Cannistraro refers and upon which he bases his allegations of so-called ex parte communications, is a letter, dated 11 February 1988, from Goldsmith (the "Goldsmith Letter"). The Goldsmith Letter does not make reference to anything concerning Cannistraro other than the appointment of the trustee for the restitution.

There is a stark contrast between the Cannistraro Recusal Motion and Cannistraro Brief and the Pollack Motion. For example, the Cannistraro Brief states:

> Judge Lechner MAY have had numerous ex parte communications DURING THE POST-CONVICTION PROCESS of the [First Cannistraro Indictment] with SEC lawyers and investigators who are plaintiffs in a pending civil action against [Cannistraro] on the same charges as the instant case.

Cannistraro Brief at 4, 1 4 (emphasis added). The Pollack Motion requests an order:

> 1. Setting a date for an evidentiary hearing on defendant Cannistraro's recusal motion and the allegation in connection with that motion that ex parte communications occurred between the Honorable Alfred J. Lechner and Barry Goldsmith, Esq., Ass't Chief Litigation Counsel, S.E.C. DURING THE PENDENCY of United States v. Cannistraro, Criminal No. 87-193; and
>
> 2. Disqualifying Judge Lechner under 28 U.S.C. 455(a) and 455(b)(1) from deciding defendant Cannistraro's Motion for

> Recusal because Judge Lechner has PERSONAL KNOWLEDGE of a disputed evidentiary fact relevant to the proceeding and WILL be a witness at the foregoing evidentiary hearing.

Pollack Motion at 1-2 (emphasis added).

The reference by the Pollack Motion to *ex parte* communications with the Assistant Chief Litigation Counsel of the SEC during the "pendency" of the First Cannistraro Indictment is, at best, a curious reference. Cannistraro was sentenced on the First Cannistraro Indictment on 2 November 1987. Cannistraro filed his Notice of Appeal of the Judgment and Commitment Order on 13 November 1987; it was docketed on 7 December 1987. Accordingly, it appears that jurisdiction with regard to Cannistraro was then vested in the Court of Appeals. The First Cannistraro Indictment was then no longer pending in the district court.

The Goldsmith Letter was dated 11 February 1988 and dealt exclusively with the appointment of a trustee concerning the restitution ordered from Cannistraro in connection with the First Cannistraro Indictment. Succinctly stated, there was neither an *ex parte* communication nor action taken by me during the "pendency" of the First Cannistraro Indictment, as stated in the Pollack Motion.

With regard to the second prong of the Pollack Motion, the assertion that I have "personal knowledge of a disputed evidentiary fact relevant to the proceeding" (Pollack Motion at 2, ~ 2), there is simply nothing to justify such a contention. There is no "disputed evidentiary fact related to this proceeding." The only basis for the assertion by Cannistraro that I "*may* have had numerous ex parte communications during the post-conviction process of "the First Cannistraro Indictment]", Cannistraro Brief at 4, ~ 4 (emphasis added), is the Goldsmith Letter.[25] The extent of my discussion with Goldsmith was whether the Trustee to be appointed would be a New Jersey attorney or a New York attorney.

The Cannistraro Recusal Discovery Motion which included a request for a hearing was previously denied. The unsupported Pollack Motion, which is nothing more than a restatement of the Cannistraro Recusal Motion, albeit with a questionable overtone, is also denied.

The Cannistraro Recusal Motion also suggests I should recuse myself because of my exposure to certain data at the Rule 11 hearing, detention hearing and sentencing hearing in connection with the First Cannistraro Indictment.

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[25] It is interesting to note that Cannistraro displays more precision in making allegations than does Pollack. Significantly, Cannistraro suggests I "may" have had ex parte communications and emphasizes that it occurred during the "post-conviction" process. This is in contrast to the unsupported assertions by Pollack that this occurred during the "pendency" of the First Cannistraro Indictment and that I have personal knowledge of disputed evidentiary facts.

After the Notice of Appeal was filed on 13 November 1987, I no longer had jurisdiction and the First Cannistraro Indictment was no longer pending in the United States District Court. Venen v. Sweet, 758 F.2d 117, 120 & n. 2 (3d Cir. 1985). With regard to the assertion of personal knowledge, this is nothing more than a baseless attempt to create suspicion and possibly generate an emotional reaction by anyone reading the Pollack Motion. As the Goldsmith Letter indicates, the discussion concerned exclusively the appointment of a trustee, which was accomplished on 24 March 1988. There were no discussions concerning Cannistraro, his criminal or his civil matter other than the appointment of the trustee. This observation was made on 18 August 1988 in an opinion concerning several motions Cannistraro filed in connection with his first indictment. United States v. Cannistraro, 694 F.Supp. 62, 64 (D.N.J. 1988). Indeed, it appears this "issue" was not even the subject of Cannistraro's appeal. United States v. Cannistraro, 871 F.2d 1210 (3d Cir. 1989).

Discussion

The two grounds upon which Bertoli, and apparently Cannistraro, base their motions for recusal are distinct and are analyzed separately.

Rule 32

The claim that I reviewed a presentence report in another case two years ago warrants recusal is based on Federal Rule of Criminal Procedure 32(c)(1) which states, in pertinent part:

> The [presentence] report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty ..., except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

Id.

The Supreme Court has commented on this rule and stated:

> [T]he rule must not be taken lightly. Presentence reports are documents which the rule does not make available to the defendant as a matter of right. There are no formal limitations on their contents, and they may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged. To permit the ~ parte introduction of this sort of material to the judge who will pronounce the defendant's guilt or innocence or who will preside over a jury trial would seriously contravene the

> rule's purpose of preventing possible prejudice from premature submission of the presentence report. No trial judge, therefore, should examine the report while the jury is deliberating since he may be called upon to give further instructions or answer inquiries from the jury, in which event there would be the possibility of prejudice which Rule 32 intended to avoid. Although the judge may have that information at his disposal in order to give a defendant a sentence suited to his particular character and potential for rehabilitation, there is no reason for him to see the document until the occasion to sentence arises, and under the rule he must not do so.

Gregg v. United States, 394 U.S. 489, 492 (1969).

The Gregg court had before it a situation where a presentence report about a defendant may have been viewed by the trial judge before the trial was completed. The case sub judice presents the different factual setting of a presentence report concerning Cannistraro and his First Indictment two years before the present matter.

Rule 32(c)(1) does not require recusal when a judge has reviewed a defendant's presentence report in another proceeding. See United States v. Clark, 605 F.2d 939, 941 (5th Cir. 1979) (reading a presentence report after guilty plea later withdrawn not basis for recusal when presiding over jury trial). See also United States v. Lyon, 588 F.2d 581, 583 (8th Cir. 1978), cert. denied, 441 U.S. 910 (1979); United States v. Montecalvo, 545 F.2d 684, 685 (9th Cir. 1976), cert. denied, 431 U.S. 918 (1977); United States v. Bourque, 541 F.2d 290, 296 (lst Cir. 1976). The Clark court held that a review of a presentence report by a trial judge was not basis for disqualification "where the report had properly come to his attention during the performance of his judicial duties." 605 F.2d at 941.

The Third Circuit reviewing a trial judge who had read a presentence report before trying a defendant a second time noted that **application of** "the doctrine ... is not explicitly mandated." United States v. Small, 472 F.2d 818, 821 (3d Cir. 1972). Small suggests a presentencing review of the presentence report by a trial judge very well might be warranted in some circumstances:

> Important to an application of the Gregg principles in any of these situations would be the Supreme Court's guideline in Fallen v. United States, 378 U.S. 139, 142, 84 S.Ct. 1689, 1691, 12 L.Ed.2d 760 (1964), that:
>
> > the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective' of the circumstances. Rule 2 begins with the admonition that "[these rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."
>
> In Gregg, the Court stated that "there is no reason" for a judge to see a presentence report until sentencing occurs. Gregg v. United States, 394 U.S. at 492, 89 S.Ct. 1134. As the present case. and the other examples above. demonstrate. however. circumstances often may arise when the judge views a

> defendant's presentence report for legitimate purposes before trying him or presiding over his trial.

Id. at 821-22 (emphasis added). The Small court referred to a balancing test.

> It thus becomes necessary to balance Rule 32's objective of preventing even the possibility of prejudice with the administrative convenience, simplicity of procedure and prevention of delay implicit in having a single judge preside over a **defendant's** court appearances.

Id., at 822.[26]

Since Small, courts have had opportunity to consider these questions. A thorough analysis of these issues was presented in United States v. Frezzo, 563 F.Supp. 592 (E.D. Pa. 1983), aff'd mem., 734 F.2d 8 (3d Cir.), cert. denied, 469 U.S. 979 (1984). In that case the defendant moved to have the judge recuse himself from presiding over a criminal jury trial for conspiracy and receiving stolen property because he had read a presentence report following defendant's conviction for violation of the Federal Water Pollution Act. Id. at 593. Defendant also contended the judge's exposure to information about him presented by the Government in a hearing to reduce sentence created an appearance of bias. Id.

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[26] The Circuit noted in Small that:

> The conflicting values involved in applying the teaching of the Gregg case to the present appeal need not be reconciled because the judgment must be reversed on other grounds. The same questions, however, are likely to arise again. The complex nature of the values at stake merits consideration by the district courts.

472 F.2d at 822

The Frezzo court stated that the recusal motion was based on Gregg principles, not on Section 455(a).[27] Frezzo's review of the case law on this issue, some of which has already been cited, merits repeating

> The Court's decision not to recuse itself in the present case is supported by the holdings, and the reasoning, of virtually every case which has considered the question of recusal in similar circumstances At least two courts have stated flatly that information contained in presentence reports properly brought to a judge's attention during the performance of his duties is not a basis for disqualifying the judge United States v Clare, 605 F 2d 939, 940-44 (5th Cir. 1979); United States v Montecalvo, 545 F 2d 684, 685 (9th Cir 1976), cert denied, 431 U S 918, 97 S Ct 2184, 53 L Ed 2d 229 (1977) As the Court in Clark stated, quoting Smith v United States, 360 F 2d 590, 592 (5th Cir 1966), the suggestion that disqualification is proper because a judge has viewed a presentence report is "highly untenable in light of the decisions that a trial judge who

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[27] The Court noted:

> The appearance of bias as claimed by the defendant i8 based solely upon the fact that this Judge, more than four years ago, reviewed a presentence report prior to the imposition of sentence upon defendant and presided over post-trial proceedings.

Frezzo, 563 F.Supp. at 593.

> is familiar with the defendant's background by reason of having tried *him* in previous cases, is not thereby disqualified to try the same defendant in subsequent cases, 605 F 2d at 941 Courts *have* also explicitly held that where *a* judge is faced with a trial of a defendant whose presentence report he has read in a prior case refusal to recuse is proper. A number of cases have also considered further proceedings in the same trial after a presentence report has been reviewed, without violation of Fed.R. Crim.P. 32, and have concluded that recusal was not required. Finally, several cases, while not specifically discussing the problem of presentence reports, have held that prior judicial exposure to a defendant does not constitute grounds for recusal

Id. at 595-96 (citations omitted).

There is no possibility of prejudice in the case sub judice. Bertoli was not a defendant in the First Cannistraro Indictment. Neither Bertoli nor Cannistraro has indicated action or comment to even suggest prejudice •to one or the other of them. Bertoli contends:

> "Your Honor reached the conclusion that 'Liquidation Control and Toxic Waste were used ... to defraud, to manipulate, to swindle. There is no way around it.' (Sentencing Hearing, United States v. Cannistraro, 11/7/87 p. 48). Your Honor could only have reached that conclusion based on the presentence report , since Mr. Cannistraro's conviction was based on a plea of guilty."

Bertoli Short Amendment at 2. The Government points out that the same conclusions were ascertainable from Cannistraro's admissions.[28]

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[28] The Government notes Cannistraro admitted:

1. That he agreed with William Fritz, portfolio manager of the M-1 Growth Fund, that Fritz would cause his fund to purchase blocks of [Liquidation Control securities and, in exchange therefore, Cannistraro would aid Fritz in establishing a nominee account at Monarch Funding Corp. ("Monarch") (Transcript of Cannistraro plea allocution (Tr. at 36);
2. That he (a) aided and abetted Fritz in obtaining the allocation of CI stock for Fritz' nominee account in December 1982; (b) was aware of the sale of the CI stock by the Fritz nominee account in February 1983 at a profit of approximately $5,500; and (c) aided and abetted Fritz in purchasing and selling Toxic Waste securities through the Fritz nominee account for a profit of approximately $50,000 (Tr at 37-39);
3. That he (a) proposed to Bynam Vickory, portfolio manager of the Aggressive Growth Shares Fund, that Vickory purchase 25,000 Shares of LCI for the fund's account; (b) assisted Vickory in establishing a nominee account at Monarch; and (c) obtained an allocation of Toxic Waste stock for Vickory's nominee in the initial public offering (Tr at 40-41);
4. That he failed to disclose Toxic Waste research reports that he had holding Toxic Waste seurities for his own benefit, and failed to disclose his arrangements with Fritz and Vickory (Tr, at 35, 50); and

These observations do not prejudice Bertoli; nothing is said about him or his conduct. Only Cannistraro and his dealings with the corporations are mentioned. Even is there were some slight prejudice as a residue from the First Cannistraro Indictment, courts have held that the determination of guilt by a jury mitigates the possibility of such prejudice. Frezzo, 563 F.Supp. at 595; United States v. Ferretti, 508 F.Supp. 913, 916 (E.D. Pa. 1981).

Against this minimal chance of any prejudice to Bertoli or Cannistraro is the substantial burden such a recusal would place on the court in this instance and in the future. As the Frezzo court noted:

> [A]dministrative burdens are raised by the transfer itself, burdens which would be substantial for the court system as a whole if recusal were held to be justified on the basis of the allegations the defendant has made here. Severe burdens would be placed on the judicial system if a judge had to withdraw from a case whenever h- or she had presided over proceedings in the same or a related case that provided nonevidentiary information about a defendant ... The reasoning supporting recusal in the present case could extend to require recusal where a judge heard evidence later suppressed, or presided over bail or probation revocation hearings Such reassignment would impose

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> 5. That he caused his false and misleading Toxic Waste research reports to be disimated to the investing public with the intent of causing an inerease in the price of the securities (Tr at 35).

Government Opposition to Bertoli at 25-26 and Exhibit 6

> unnecessary burdens, and could also, since recusal is often at the defendant's request, subvert the purpose of this Court's system of random assignment of judges to cases

563 F Supp at 595 (citations omitted).

Given that neither a showing of prejudice nor even the appearance of prejudice has been made concerning Bertoli or Cannistraro, Rule 32(c)(1) does not require recusal.

Section 455(a)

The First Cannistraro Indictment

Section 455(a) states "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned " 28 U.S. C. § 455(a) (emphasis added) To ensure the impartiality of the judiciary section 455(a) and its companion section 455(b) are strict and do not require a motion by the parties to take effect

> A judge must determine, sua sponte, whether any of the grounds for disqualification enumerated in that provision are present in a case. If any ground specified in section 455(b) is present, he must disqualify himself immediately. If such specific grounds are not present, but if, for any reason, "his impartiality might reasonably be questioned," than he must either disqualify himself or seek a waiver after "full disclosure on the record." ... All this must be done, if necessary, on his own motion. As the Seventh Circuit has noted, section 455 "impose[s] no duty on the parties to seek disqualification nor [does it] contain

> any time limits within disqualification must be sought."

United States v. Schreiber, 599 F.2d 534, 539 (3d Cir.) (citations omitted), cert. denied, 444 U.S. 843 (1979).

The test when considering a recusal motion is whether a reasonable person aware of all the circumstances would have doubts concerning the impartiality of the particular judge. Martorano, 866 F.2d at 67; Dalfonso 707 F.2d at 760. The existence of actual prejudice is not required. United States v. Sciarra, 851 F.2d 621, 635 (3d Cir. 1988). However, the basis for recusal must arise from the incidents or activities outside of the judges' trial role: the Third Circuit has described this as extrajudicial bias.

> "Extrajudicial bias" refers to a bias that is not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings.

Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980) (citations omitted), cert. denied, 450 U.S. 999 (1981).

In United States v. Sinclair, 424 F.Supp. 715 (D. Del. 1976), the judge denied a motion pursuant to Section 144 to disqualify himself based upon the allegations of defendant that the judge had a personal prejudice against him and bias in favor of the United States because the judge previously sentenced him, because the judge scheduled the trial promptly within the Speedy Trial Act and because of pretrial publicity against the defendant. The trial court noted that:

> Personal bias is defined as an attitude arising from extrajudicial sources that results "in an opinion on the merits on some basis other than what the judge learned from his participation in the case," ... or results in an "attitude toward [the] petitioner that is significantly different

> from and more particularized than the normal, general feeling of society at large against convicted wrongdoers." ...
>
> On the other hand, it is equally clear that a claim of bias or prejudice based on judicial knowledge gained from prior hearings or other cases is not sufficient grounds for disqualification of a judge whether it be from prior judicial exposure to the defendant or prior judicial rulings adverse to the defendant in the same or different cases.

Id. at 718 (citations omitted). As the Sinclair court observed: "the bare allegation that other inflammatory information had come to the judge's attention is far too general to be the basis for disqualification.'" Id. at 719 (quoting United States v. Roca-Alvarez, 451 F.2d 843, 848 (5th Cir. 1971), reversed on reh'g on other grounds, 474 F.2d 1274 (5th Cir. 1973)).

In the matter entitled In re Martin-Trigona, 573 F.Supp.
1237 (D. Conn. 1983), a motion for disqualification which was brought pursuant to 28 U.S.C. § 144[29] and 455 was denied. It appears that the defendant, Martin-Trigona, is an individual known for extensive and vexatious litigation in the federal courts. As found by the district judge, he demonstrated a pattern of demonstrating admiration or respect initially for the judge to whom his cases were assigned, but that admiration or respect dissipated with the first unfavorable ruling. Thereafter, Martin-Trigona would file suit against the judge, the judge's family, his attorneys and anyone else within range. 573 F.Supp. at 1240. In In re Martin-Trigona, after initially praising

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[29] The requirements of a recusal motion under § 144 are discussed infra at pages 47-48. Neither Bertoli nor Cannistraro has invoked section 144 as a basis for their respective motions.

the district judge, Martin-Trigona sought his recusal because of adverse rulings.

The judge considered the motion under both section 144 and section 455. He noted: "(construing the motion to recuse as a motion filed pursuant to 28 U.S.C. § 455, the court finds that in the totality of the circumstances, and in the exercise of the court's discretion under that statute, recusal is not appropriate in this instance." Id. at 1242. The judge noted:

> [I]t is clear that a judge is not disqualified under 28 U.S.C. ~ 455 (or under 28 U.S.C. ~ 144 for that matter) merely because a litigant sues or threatens to sue him. ... Neither is a litigant's intemperate and scurrilous attack on a presiding judge a valid ground for recusal. ... There is an obligation on the part of a judge to decline to recuse himself for a "relatively trivial reason ... "It is a judge's duty to refuse to sit when __ disqualified but it is equally his duty to sit where there is no valid reason for recusa[l]."[30]
>
> The right to an impartial judge cannot be advanced so broadly as to permit the parties to engage in "judge-shopping" under the guise of a motion to recuse, ... or to permit a litigant to disqualify without reasonable grounds a succession of judges for the apparent purpose of impeding the administration of justice.
>
> 28 U.S.C. § 455 as amended establishes an objective standard for recusal, known as the "appearance of justice" rule. ... The

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[30] The test applied her- is whether a reasonable person, aware of all of the facts, would question my impartiality.

> appropriate test for disqualification under § 455(a) is whether a reasonable person with knowledge of all the facts would be led to the conclusion that the judge's impartiality might reasonably be questioned.

573 F.Supp. at 1243 (footnote and citations omitted; emphasis in original).

The allegations in this case, however, are simply too tenuous and incredible to create even the appearance of impropriety with regard to either Bertoli or Cannistraro. A reasonable person -- the average person on the street with knowledge of all the facts and circumstances -- would not question my ability to sit impartially on this case. Id. at 1237.

Bertoli argues that viewing the presentence report and hearing allegations of criminal conduct by Bertoli during the First Cannistraro Indictment requires recusal under 455(a). As previously noted, even in cases where the same defendant's presentence report had been viewed by a judge, recusal on grounds of prejudice was not required. Clark, 605 F.2d at 941: Frezzo, 563 F. Supp. at 594-95. This applies a fortiori concerning the Bertoli Recusal Motion; the presentence report dealt with Cannistraro's First Indictment.

Bertoli also seeks my recusal because I heard allegations by Cannistraro's attorney linking Bertoli to illegal activities. 3 November 1989 Bertoli Letter Brief at 1. The Transcript of Proceedings in United States v. Cannistraro, 2 November 1987 ("Nov. 87 Tr. at _") reveals that Cannistraro's attorney asserted that the U.S. Attorney's office had "chased" Bertoli for years. Id. at 17, 19. At the sentencing hearing, Cannistraro's attorney attempted to put the Governments' motives in doubt and to cast the blame for his client's actions elsewhere. Cannistraro's attorney, David O'Connor, Esq., stated that the Government was attempting to reach Bertoli through Cannistraro. O'Connor made no outrageous or derogatory statements about Bertoli. He never stated Bertoli was guilty of anything. In fact, he described Bertoli as "charming" and "very pleasant." Id. at 19.

Even if O'Connor or the Government made derogatory statements about Bertoli, there would not be grounds for recusal. Section 455(a) motions "must rest on the kind of objective facts that a reasonable person would use to evaluate whether an appearance of impropriety had been created, not on 'possibilities' and unsubstantiated allegations." Martorano, 866 F.2d at 68.

In United States v. Cowden, 545 F.2d 257 (lst Cir. 1976), cert. denied, 430 U.S. 909 (1977), the trial judge had denied a recusal motion based on the fact he had presided over the jury trials of four others indicted with the defendant. Cowden argued the judge might "appear to have prejudged the issues presented in his case." Id. at 265. The **First Circuit** rejected this claim.

> Insofar as the judge's presiding over the prior trials of Cowden's codefendants may have resulted in his learning about facts damaging to Cowden, the situation is not much different from when a presiding judge learns about evidence, later excluded, damaging to a defendant at a bench conference in the same proceeding. While judges attempt to shield themselves from needless exposure to matters outside the record, they are necessarily exposed to them in the course of ruling on the admission of evidence; and the judicial system could not function if judges could deal but once in their lifetime with a given defendant, or had to withdraw from a case whenever they had presided in a related or companion case or in a separate trial in the same case.

Id. at 265-66.

In Cowden the trial judge had presided over multiple jury trials, not a plea and sentencing hearing. The-statements by the First Circuit apply with greater force in this case. Anything said about Bertoli or Cannistraro and heard in the course of sentencing cannot be considered "extrajudicial" in the sense that I learned or had knowledge of it from sources outside my judicial duties. Sciarra, 51 F.2d at 634-35 n. 8.

I made no reference to Bertoli at any time during the proceedings in the First Cannistraro Indictment. There is nothing to suggest I may have formed an unfavorable impression or any impression regarding Bertoli. All of my comments focussed on Cannistraro. Nov. 87 Tr. at 46-50. No mention is made of Bertoli or indeed any associates of Cannistraro. Considering the mild form of any allegations about Bertoli, the two year lapse of time between the sentencing in the First Cannistraro Indictment, the allegation and this case, the nature and aim of an attorney's comments during sentencing and the fact that I did not even acknowledge those arguments which attempted to shift blame to the Government or Bertoli, it would be unreasonable to impute partiality or its appearance to hearing such comments.

Bertoli's Allegations

Bertoli has made a number of disparaging statements all in connection with the First Cannistraro Indictment and the sentencing of Cannistraro. The statements include the following:

> Your actions as a Judge in that matter the First Cannistraro Indictment] is [sic] an absolute disgrace to the robes you wear.
>
> The opposition to your nomination as a Judge was well founded in that your Judicial Temperament and unfair

> mannerism requires you in fairness to resign from the bench.

Bertoli Amended Brief, Exhibit A.

> This letter is a formal complaint and request to reprimand and take such other action including impeachment of Alfred J. Lechner, Jr., who is a disgrace to the Federal court and all members of the Judiciary....
>
> Mr. Lechner has displayed a lack of judicial temperament and truly needs psychiatric help and analysis.

Bertoli Amended Brief, Exhibit B.

> It is apparent to me that he has been used as a willing tool of the administration to wreck [sic] havoc upon anyone who attempts to criticize the poor administration of the "Super Fund."

Id. I have never responded to the allegations of Bertoli. The Bertoli Recusal Motion represents the first instance in which Bertoli's accusations were formally raised in any forum. Indeed, those statements were not the subject of any comment by anyone before this opinion.

The Third Circuit has indicated that criticism directed toward a judge does not automatically provide grounds for recusal. In Martorano a judge had been attacked in the press for favoring an attorney and Martorano claimed that as a client of the attorney he had been given a harsher sentence so that the judge could refute the charges. He also alleged that because of allegations made by a codefendant, the judge harbored a prejudice against him.[31] The Martorano court noted that "[b]y training and inclination, judges meet media criticism of their actions with robust insensitivity.~ 866 F.2d at 69. The Third Circuit rejected the notion that mere allegations, even in the press or by a close associate of defendant would affect a judge's impartiality. The Circuit quoted the district court with approval stating:

> only "speculation" would lead a reasonable person to conclude, absent any evidence, that [the trial judge] had reimposed the same sentence not for the factors that underlay his original choice, but to rehabilitate the damage allegedly done to his reputation by the newspaper stories. ... Again. since the test for recusal is a reasonable Person one. a movant must supply some objective facts that support his position. not mere speculation.

Id. at 68 (emphasis added). Bertoli has not come forward with objective facts to support his position. He has made accusations but demonstrated no word or action by me to indicate the threat or appearance of partiality.

It is significant that the Bertoli Recusal Motion is filed pursuant to 28 U.S.C. § 455(a). The motion for recusal or disqualification was not filed pursuant to 28 U.S.C. § 144. Section 144 states:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice

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[31] Martorano was decided under the appearance of bias standard under section 455(a); actual bias was not at issue. Martorano, 866 F.2d at 67. 46

> either against him or in favor of the adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may only file one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Id.

As noted above, section 144 requires not only an affidavit of the party but, as well, a "certificate of counsel of record stating that it "the application as a whole[32]] is made in good faith." Id. In the case of In re Union Leader Corp., 292 F.2d 381 (lst Cir.), cert. denied, 368 U.S. 927 (1961), the First Circuit found that an application for the recusal of the judge "scarcely merits a lower standard" than that imposed under Fed.R.Civ.P. 11. Id. at 385.

Although the Bertoli Recusal Motion is made under section 455, not section 144, counsel for Bertoli submitted a certificate of good faith.[33] The 2 November

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[32] See In re Union Leader Corp., 292 F.2d 381, 385 (lst Cir.), cert. denied, 368 U.S. 927 (1961), where the court interpreted the word 'it' in the statute as referring to the application as a whole, and [held] that counsel's good faith must be stated." Id.

[33] Specifically, an affidavit of Sachs states: "The motion of defendant Bertoli for an Order of Recusal under 18 U.S.C. 455(a) is made in good faith." 2 November 1989 Sachs Aff. at 5.

1989 Sachs Affidavit gratuitously put in issue the good faith of the Bertoli Recusal Motion. Less than three weeks later, the Bertoli Reply Brief was filed. Significantly, this Reply Brief states: "Defendant Bertoli's recusal motion is not based on a claim that Judge Lechner is in fact biased against him." Bertoli Reply Brief at 2.

All of the conduct which forms the basis for this application originates with Bertoli. Bertoli neither alleges nor implies any conduct on my part to form the basis for the section 455 application. In light of the conduct of Bertoli, the selection of section 455, the exclusion of section 144 as the basis for his recusal motion and the statement of his counsel that there is no prejudice in fact, my impartiality cannot "reasonably" be questioned.

Clearly, Bertoli does not believe I harbor any prejudice against him or bias in favor of the Government. In light of this and of the generally accepted principle that the defendant has a right to be tried before an unbiased judge, the issues presented is whether public confidence in the courts may require recusal. Accordingly, it is the public perception which must be addressed. If this claim is sufficiently meritorious, corrective action should be taken immediately, as requested by Bertoli and his counsel.

As mentioned, a section 144 application requires a certificate of counsel that the application is made in good faith. As noted in In re Union Leader Corp.: "If a certificate is to serve the purpose of shielding a court which cannot test the truth of the claimed facts, it should at least carry the assertion that counsel believes the facts alleged to be accurate and correct." 292 F.2d at 385. No such safeguard is offered pursuant to section 455. The apparent reason for the lack of such a safeguard in section 455 is that pursuant to section 144 the filing of such an affidavit automatically triggers other proceedings. Pursuant to section 455, however, the judge against whom the application is filed must make appropriate findings based upon the submissions. In making those findings, it is obvious that such a judge must inquire into the basis for the application and must exercise appropriate discretion.

In re Union Leader Corp. concerned a writ of mandamus to order a judge to revoke his actions striking an affidavit of bias and prejudice and to order him to disqualify himself from conducting further proceedings. The stricken affidavit was based upon an alleged attack on the judge by a newspaper involved in a private antitrust action and the judge's reactions to that publication. Apparently editorials were published during the prior decade about the judge and his conduct in unrelated matters.

The judge was confronted with a situation where a reporter for the petitioner seeking the mandamus telephoned the judge at his home to write a follow-up story. The judge informed the that the petitioner's article was libelous but refused to give any further follow-up. The reporter was not content and followed the judge to his chambers hoping to be more productive. When confronting the judge with regard to any further comment, the judge responded that the petitioner's actions were contemptible-. The reporter printed that comment. Shortly thereafter, the petitioner had its reporter prepare an affidavit and account of the conversations with the judge which the petitioner retained "in case a contingency arose." The First Circuit found that the reference to retaining the affidavit in contingency arose "obviously, ... meant if it should later conclude to file an affidavit of prejudice" this documentation would be necessary. Id. at 387.

The First Circuit found that the action of the judge in striking the affidavit was correct and it did not issue a mandamus. Some of its comments with regard to the matter are instructive. It noted that "neutrality in the absolute sense cannot be expected. 'Personal bias or prejudice' calls only for practical objectives. For example, prior judicial views will not disqualify." *Id*. at 388 (citation omitted). The Circuit also observed:

> [A] judge is not prevented from sitting because he comes into every case with a background of general personal experience and beliefs. ... There must be something unique. Nor will a judge's ordinary and natural reaction to the conduct of, or evidence developed about, a party in a case before him create a disqualification....
>
> In sum, a judge must be presumed to be qualified, and there must be substantial burden *upon* the affiant to show grounds for believing the contrary.

Id. at 388-389 (citations omitted).

The Circuit noted that in a theoretical sense there were two levels to the claim of bias that were presented by the petitioner. The first was the fact that the judge was attacked and the second was the judge's response to the attacks. It did not find the first prong, the attack, sufficient. "A judge lives in an atmosphere of strife in which, by nature and experience, he is expected to be a man of 'fortitude.'" Id. at 389 (citation omitted).

The Circuit noted that a judge must "continually rule against one party or another. No judge can be so sanguine when asked to believe that he is never the object of disapproval and criticism directed to something more personal than his abstract judicial actions. If such disapproval is brought openly to his attention, he does not automatically change from benign to biased." IS With regard to the first prong, the attack, the Circuit noted: "We have found no case which suggests that an affidavit must be ruled to be sufficient simply because it might be natural for a judge to have resented something said about him." *Id*.

The Circuit next turned to the reaction of the judge to the attack. It noted that the petitioner complained that the judge expressed the opinion the petitioner was seeking to create grounds to disqualify him. "This was a serious charge of misconduct. ... During oral argument petitioner conceded that if it had published these articles for the purpose of disqualifying the judge it would have constituted contempt.[34] Petitioner, of course, denies that that was its purpose. Whether the judge was correct in his conclusion is a question of fact. Petitioner may have had other motives. But we cannot label the judge's view unwarranted." Id. at 390 (footnote omitted).

This is precisely the situation which is presented in the Bertoli Recusal Motion. There is no comment or conduct on my part, as there was in In re Union Leader Corp., upon which to base a request for disqualification. The only event here is the attack by Bertoli. The First Circuit went on to note in In re Union Leader Corp.:

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[34] Significantly, counsel to Bertoli made a similar concession during oral argument. Sachs stated:

> I would say to your Honor if this Court believed and found as a matter of fact that a defendant in this case, Mr. Bertoli, in fact, two years ago in November, 1987 new he was going to be indicted some two years later and wrote the letters in question with a specific intent to skew the system of justice, and I'll put in as harsh a way I can, in other word~, to say, all right, Judg- Lechner, come hell or high water you're not going to sit on my case, then I couldn't sit here and argue to you that kind of action should be condoned.

29 Jan. 1990 Tr. at 17-18. Of course, Bertoli knew in June 1987, some five months before he wrote the letters at issue, he was a primary subject of a criminal investigation. See note 20, supra.

> It does not seem irrelevant to compare the vehemence with which petitioner contends that it would look badly for its case to be tried by a judge who spoke unfavorably of its conduct, and its industry in seeking out such expressions and printing them.
>
> A judge's reasonable belief that a party was acting with a purpose of disqualifying him, his conclusion that such action was contemptuous and reprehensible, and even a very considerable showing of irritation, is [sic] in no way equivalent to personal bias and prejudice.

Id. Here, even if a reasonable person concluded that Bertoli's conduct was for no reason other than for the purpose of disqualifying me, such a view would not be unwarranted in light of the totality of the situation and Bertoli's prior conduct.

In this case, the distinguishing point is that there was no response or comment by me: there has been no comment that the conduct of Bertoli is contemptuous and reprehensible (although such observations by a reasonable person may not be unwarranted) and there has been no showing of irritation, much more a considerable showing, as evidenced by the judge in In re Union Leader Corp. As the Circuit noted: "A party cannot engage in conduct which has the outward appearance of being improper, and then complain of the conseguences when its conduct is taken at face value." Id. at 391.

As previously quoted, Bertoli states his: "Recusal motion is not based on a claim that Judge Lechner is in fact biased against him. Accordingly, the cases decided under § 144 have no application to the present motion." Bertoli Reply Brief at 2. Accordingly, it appears Bertoli contends neither Section 144 nor Section 455(b)(1) is applicable to his Recusal Motion.[35]

Bertoli contends:

> The Government's reliance on cases decided under 28 U.S.C., § 144, and its mistaken remonstration of defendant Bertoli for failing to do so, may perhaps be attributable to its confusion over the applicable standard. Nonetheless, the § 144 cases cited at pages 11-15 of the Government~] [opposition to Bertoli] are simply irrelevant because the only inquiry facing those Courts was whether actual bias existed.

Bertoli Reply Brief at 1-2. This contention is incorrect.

In United States v. Sibla, 624 F.2d 864 (9th Cir. 1980), the Court reviewed a denial of a recusal request. This was a situation where the defendant was pro se defending against two counts of willful failure to file income tax returns. During the course of pretrial hearings, the district judge admonished defendant about the frivolity of his defense and that the defendant would be "in great trouble in connection with the defense of [his] case if he relied" on his arguments. Id. at 866. The defendant filed the motion pursuant to 28 U.S.C. ~ 144 and filed an accompanying affidavit.

The Circuit compared sections 144 and 455. The Sibla court stated: "The test for personal bias or prejudice in section 144 is identical to that in section 455(b)(1), and the decisions interpreting this language in section 144 are controlling in the interpretation of section 455(b)(1).~ 624 F.2d at 867. As noted in Sibla:

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[35] The Pollock Motion attempts to invoke section 455(b)(1). This reliance is inapposite, as explained in this opinion.

> However, we have ruled that section (b)(1) simply provides a specific example of situation in which a judge's "impartiality might reasonably be questioned" pursuant to section 455(a). ... Sibla has not alleged grounds for recusal other than those relating to bias or prejudice stemming from the district judge's courtroom remark~. Therefore, the guestion before this court is whether the district judge erred in refusing to recuse himself for personal bias or prejudice pursuant to section 144 or section 455(a) & (b)(l). The same substantive standard will be applied to each section.

Id.

In United States v. Conforte, 624 F.2d 869 (9th Cir.), cert. denied, 449 U.S. 1012 (1990), defendants were convicted of four counts of evasion of employment taxes. There was a motion to disqualify the trial judge! for prejudice against the defendants. In Conforte there was a question as to the timeliness of the application to disqualify and it was found that due diligence was lacking. Id. at 869. It was found that defendants were on notice with regard to the complained of activity long before the trial began.

The judicial activity complained of in Conforte was the fact that the trial judge, a member of the Board of Trustees of the University of Nevada, advised the University against the acceptance of funds from the defendant, the operator of a house of prostitution. It was noted the judge mentioned the defendant was not good for Reno. As well, the judge, as president of a civic society, denied, on court stationery, an application for membership made by the defendant.

The Circuit noted: "It is reasonable to expect a judge to advise against involving educational institutions with brothel owners or felons, and we would not think that because of this advice the judge was unable to give the defendant a fair trial." Id. at 881. With regard to disqualification for bias or prejudice, the court noted:

> we think the test under either section 455] (a) or (b) is the same, namely, whether or not given all the facts of the case there are reasonable grounds for finding that the judge could not try the case fairly, either because of the appearance or the fact of bias or prejudice. We find no reasonable grounds for questioning the judge's impartiality because of bias or prejudice. While bias or prejudice may spring from many sources often extrajudicial in their origin, the negative bias or prejudice of the kind alleged here will disqualify only if it is an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes. It is an animus more active and deep-rooted than an attitude of disapproval toward certain persons because of their known conduct, unless the attitude is somehow related to a suspect or invidious motive such as racial bias or a dangerous link such as a financial interest, and only the slightest indication prejudice arising from these sources would be sufficient to disqualify.

Id. at 881.

With regard to the interpretation of section 455(a) and 455(b)(1), the court noted: "It would be incorrect as a matter of statutory construction to interpret section 455(a) as setting up a different test for disqualification for bias or prejudice from **that in section** 455(b)(1).'" Id. at 880 (citing United States v. Olander, 584 F.2d 876, 882 (9th Cir. 19~8), vacated on other grounds sub. nom. Harington v. U.S., 443 U.S. 914 (1979)).

Accordingly, Section 455(a) is interpreted the same way as section 455(b)(1) is interpreted and section 455(b)(1) is interpreted the same way as section 144 is interpreted, notwithstanding the contention of Bertoli that "the cases decided under section 144 have no application to the present motion" Bertoli Reply Brief at 2. In Olander, as cited by Conforte, the court held that the decisions interpreting section 144 are also controlling in the interpretation of the bias and prejudice language in section 455(b)~1)." Conforte, 624 F.2d at 880 (citing Olander, 584 F.2d at 882).

Significantly, there is no general conduct or disposition of mine to form the basis for this motion. Indeed, there is no specific conduct or disposition of mine which is at issue in either the Bertoli or the Cannistraro Recusal Motion.

The sole conduct at issue in the Bertoli Recusal Motion is the conduct of Bertoli. The substantive test for bias or prejudice is identical for either section 144 or for section 455(a) or (b)(l). Id. However, the procedural requirements of these two sections do differ. As mentioned, section 144 expressly conditions relief upon the filing of a timely and legally sufficient affidavit together with a certificate of counsel of record stating that the motion is made in good faith. Section 455 on the other hand has no procedural requirements and is directed to the judge rather than the parties. In addition, section 455 does not have a provision for referral of the question of recusal to another judge.

A section 144 affidavit is not legally sufficient unless it specifically alleges facts which fairly support the contention that the judge exhibits bias or prejudice directly towards a party which stems from an extrajudicial source. Sibla, 624 F.2d at 867. "As with section 144, the provisions of section 455(a) and (b)(l) require recusal only if the bias or prejudice is directed against a party and stems from an extrajudicial source." Id. at 869.

The facts which Bertoli alleges support his contention of bias or prejudice do stem from an extrajudicial source -- Bertoli himself, by his gratuitous comments with regard to the sentencing of Cannistraro in the First Cannistraro Indictment. Bertoli has not demonstrated bias or prejudice or an appearance of either on my part; there is simply no basis for his application.

The Frezzo court noted the importance of extrajudicial bias in an analysis such as this:

> Most courts which have considered § 455(a) have held that the determination whether a judge's impartiality might reasonably be questioned is to be made solely on the basis of conduct extrajudicial in nature. Davis v. Board of School Commissioners of Mobile Cty., 517 F.2d 1044, 1052 (5th Cir.), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976);.... Another Court's position on this question is unclear. Compare United States v. Coven, 662 F.2d 162, 168 (2d Cir. 1981) (fact that allegedly prejudicial information is learned in a judicial rather than a personal capacity is "relevant" to the appearance of impropriety) cert. denied, 456 U.S. 916 (1982)]; In International Business Machine Corp., 618 F.2d 923, 929 (2d Cir. 1980) ("We conclude that under section 455(a) the bias to established must be extrajudicial and not based upon in-court rulings.") The Third Circuit has approved the Davis holding, and stated that "[i]nsofar as the policy behind 455 is concerned with matters of potential influence which exist "outside the courtroom' we agree that the

> primary inguiry ought to be into extrajudicial conduct." Mayberry v. Maroney, 558 F.2d 1159, 1162 n. 16 ([3d cir.] 1977). Even where conduct in a judicial context is considered, however, it will serve to disqualify only in "exceptional circumstances," where the conduct reflects pervasive bias and prejudice.

Frezzo, 593 F.Supp. at 597 (some citations omitted). Other conditions such as a prohibition against judge shopping and the conduct of litigants may be weighed. See Dalfonso, 707 F.2d at 760-61; Haas v. Pittsburgh National Bank, 627 F.2d 677, 680 (3d Cir. 1980).

In re United States, 666 F.2d 690 (lst Cir. 1981) concerned a review, pursuant to writ of mandamus, of a trial judge's denial of a motion to disqualify himself under section 455(a). The Government motion to disqualify was the judge's past and present close professional relationship with former Massachusetts Governor John Volpe, the defendant's assistance to the governor during a 1966 legislative session and the judge's own reported involvement in that proceeding as the governor's legal counsel. In addition, it appears the judge, who served during that legislative session as legal counsel, was also part of the governor's "kitchen cabinet" and was the only person apart from the chief Secretary to have direct access to the governor. There was also evidence of the long personal friendship with the governor.

There was wide publicity after a mistrial following a twenty-five day trial. The publicity suggested that the judge had a bias in favor of the defendant based upon his association with Governor Volpe. Apparently, the defendant was of considerable assistance or attempted to be of considerable assistance to the governor some fifteen years earlier.

Before reviewing the circumstances and finding no basis to reverse the denial of the motion to disqualify, the First circuit set out the standards for review. It noted the case and particularly the issue of partiality had been broadly publicized and the claim of bias could not be labeled as frivolous; therefore it took the matter pursuant to the writ of mandamus on an interlocutory basis.. Significantly, it cited In re Union Leader Corp., a section 144 case, with regard to the necessity to maintain public confidence in the court system, a section 455(a) consideration. Id. at 694.

It noted the "first and most obvious policy" is that courts must actually be and must appear to be free of bias or prejudice. Id. It noted the situation must be viewed through the eyes of an objective person. A "second but less obvious policy" is that a judge to whom a case has been assigned should not recuse himself on unsupported, irrational, or highly tenuous speculation; were he or she to do s0 the price of maintaining the purity of appearance would be the power of litigants or third parties to exercise a negative veto over the assignment of judges." Id. This is precisely the situation which is presented by Bertoli. The application itself, if not frivolous, is highly tenuous speculation based upon self-serving conduct.

The First Circuit noted that initially there must be a charge of partiality supported by a factual basis. "Although public confidence may be as much shaken by publicized inferences of bias that are false as by those that are true, a judge considering whether to disqualify himself must ignore rumors, innuendos, and erroneous information published as fact in the newspapers." Id. at 695.

Secondly, the Circuit noted that:

> disqualification is appropriate only if the facts provide what an objective. knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality. Were less required, a judge could abdicate in

> difficult cases at the mere sound of controversy or a litigant could avoid adverse decisions by alleging the slightest of factual bases for bias.

Id. (emphasis added) (citing H.R. Rep. No. 1453, 93d Cong., 2d Sess., reprinted In 1974 U.S. Code Cong. & Admin. News, 6351, 6355 ("House Report, 1974 U.SCCAN at ")).

The Court went on to note that:

> Basic to our analysis is the undisputed conclusion that the judge did in fact have a close relationship with Governor Volpe. It is from this relationship the government infers two different causes for an appearance of partiality: it reasons that the judge's alliance to Volpe would appear to cause him to reward Kelly for handling the 1966 investigation in a manner favorable to Volpe, and that his allegiance to Volpe might make the public doubt his ability to respond impartially to the Masiellos when they appear as witnesses at Kelly's trial.

Id. at 696. The Circuit noted: "Even viewing all of the facts and inferences in a manner most favorable to the government, we cannot say that the only conclusion on this record as a matter of law is that the judge should have disqualified himself. Such ruling would go far to establish the precedent that any suspicion of partiality, though tenuous and remote in origin, would suffice to compel disqualification." Id. at 697.

The facts of In re United States were far more substantial than they are in this case. In point of fact, there is no foundation, other than Bertoli's conduct, which form the basis for this motion. In re United States concerns significant conduct of the trial judge in his history with the governor and the governor's family which formed the basis for an arguable, "reasonable" basis for doubting the judge's impartiality. That situation plainly is not present in Bertoli's Recusal Motion.

In United States v. Greenouah, 782 F.2d 1556 (llth Cir. 1986), a motion for recusal pursuant to section 455 was denied by the district judge and affirmed by the Circuit. The Greenouah arise out of a situation where it might be said it was the conduct of the judge which caused the 455 motion. Briefly, it appeared that the federal judge communicated with the state judge with regard to a conflict between the two as to which forum would try the defendant first. Thereafter, a story appeared in a local newspaper indicating that the state judge changed his mind and adjourned the trial after speaking with a very persuasive and very angry district judge.

The Circuit noted the district judge reviewed all the appropriate authorities and indicated that although he did speak with the state judge he unequivocally stated in his order there was no truth to the conclusory statements by a newspaper reporter that he was angry. Moreover, there was only a one-sentence comment in the article referring to the judge as very persuasive and very angry. The Circuit noted: "Under objective standards, there can be no reasonable inference of impartiality by the fact of the district judge, having a conversation with the state judge. Id. at 1559. The Circuit accepted at face value the unequivocal statement by the district judge denying the sentence in the news report attributing anger to him. Greenouah quoted from In re United States that:

> Although public confidence may be as much shaken by publicized inferences of bias that are false as by those that are true, a judge considering whether to disqualify himself must ignore rumors, innuendos, and erroneous information published as fact in the newspapers. ... To

> find otherwise would allow an *irresponsible, vindictive or self-interested* press informant and/or an irresponsible, misinformed or careless reporter to control the choice of judge [sic].

Greenough, 782 F.2d at 155~ (citing In re United States, 666 F.2d at 695).

In Sciarra, the court noted, in connection with the appearance of District Judge Harold A. Ackerman on 60 Minutes and grant of interviews to various newspaper publications, that because standing was not appropriate a refusal to disqualify would not be disturbed. In that case, the Circuit observed that:

> Congress designated subsection (a) of the statute [§ 455] a "general or catch-all provision" designed to enhance public confidence in the impartiality of the judicial system by requiring a federal judge to disqualify himself in any proceeding when "his impartiality might reasonably be questioned."

651 F.2d at 634 (quoting House Report, 1974 USCCAN at 6355).

The Circuit went on to note that:

> Our court has interpreted subsection (a) to mean that "a judge should recuse himself where a reasonable man knowing all the circumstances would harbor doubts concerning the judge's impartiality."

Id. (citing Dalfonso, 707 F.2d at 760). The Seiarra court noted the legislative history for section 455(a) that:

> [T]his general standard is designed to promote public confidence in the impartiality of the judicial process by

> saying, in effect, if there is a *reasonable factual basis for doubting* the judge's impartiality, he should disqualify himself and let another judge preside *over the case*.

Id. at 635 (first emphasis supplied, second emphasis in original) (citing *House Report*, 1974 USCCAN at 6355).

In *Olander*, a defendant filed an affidavit seeking recusal for personal bias pursuant to Section 144. The affidavit noted the defendant

> had been involved in and had been a leader in public attempts to have Judge Boldt impeached because of his "improper conduct" in *United States v. Washington*, that in these efforts the defendant] appeared in newspapers and on T.V., that there had been wide publicity and news coverage about the petitions for impeachment, that he is confident that Judge Boldt must know about them, and that [the defendant] does not believe he can get a fair trial.

584 F.2d at 887. The Circuit found that recusal was not warranted and reasoned that the affidavit submitted by the defendant

> does not show the probability of the kind of personal prejudice of the Judge toward [the defendant] that would require disqualification. The affidavit does show that [the defendant], because he does not like the decision in *United States v. Washington*, has lost his objectivity toward Judge Boldt. It does not show a comparable loss of impartiality on Judge Boldt's part.

Id. at 888

The Olander case is similar and dissimilar to the situation present. It is similar in the fact that Bertoli does not like the sentence imposed in the First Cannistraro Indictment upon his co-defendant and has lost his objectivity toward me. The comparable loss of impartiality on my part. It is dissimilar in that Bertoli's counsel has stated that the "recusal motion is not based on a claim that Judge Lechner is in fact biased against [Bertoli]." Bertoli Reply at 2.

In a similar vein, the First Circuit has noted when a party seeks recusal, that party must show not only that he has made an attack on the judge but that the actions of the judge evidence a personal prejudice against that party. In re Leader Corp., 292 F.2d at 389. The court also stated:

> [A] judge's reasonable belief that a party was acting with A purpose of disqualifying **him, his** conclusion that such action was contemptuous and reprehensible, and even a very considerable showing of irritation, is in no way equivalent to personal bias and prejudice.

Id. at 390 (citations omitted). see also Martorano, 866 F.2d at 69.

Significantly, although it appears a reasonable person informed of all of the facts may well conclude the conduct of Bertoli was undertaken with the purpose of seeking my disqualification, I have not commented to the effect that the conduct of Bertoli is contemptuous and reprehensible, indeed I have not commented prior to this opinion with regard to the conduct of Bertoli and I have shown no irritation at all in connection with Bertoli's conduct.

> "only a psychic pleader could allege that because a

> > defendant has published uncomplimentary statements concerning a judge, the latter will be unable to give his critic a fair and impartial trial. If such a fantastic procedure were permitted, a defendant could get rid of a judge by the simple expedient of publishing a scurrilous article, truthfully alleging that the article was published, and clinching the matter by asserting the bald conclusion that, since the article was uncomplimentary, the judge must of necessity be prejudiced against the **publisher.**"
>
> United States v. Fujimoto, [101 F.Supp. 293, 296 (D. Haw. 1951)]. The mere fact that a defendant has made derogatory remarks about a judge is insufficient to convince a sane and reasonable mind that the attacked judge is biased or prejudiced, the standard used to test the sufficiency of an affidavit for recusal under section 144. [citations omitted] ... To allow prior derogatory remarks about a judge to cause the latter's compulsory recusal would enable any defendant to cause the recusal of any judge merely by making disparaging statements about him. Such a bizarre result clearly is not contemplated in section 144.

United States v. Garrison, 340 F.Supp. 952, 957 (E.D. La. 1972) (emphasis added).

The Third Circuit discussed in DalFonso a denial of a motion for recusal. The case concerned a charge of distributing and conspiring to distribute narcotics. At a pretrial hearing the Government advised the court an informant notified the FBI that the prosecutor and **one of the defense attorneys** were going to fix the case. The judge acknowledged he was friendly with one of the defense attorneys but denied any attempt to fix the case. Although initially deciding to recuse himself, on reconsideration the judge decided not to effect recusal because of the undesirable precedent recusal would set in light of the basis for the motion for recusal.

In considering the recusal aspect of the appeal, the Circuit noted: "At the outset we observe that a federal trial judge's decision with respect to recusal may be reversed only for abuse of discretion." Dalfonso, 707 F.2d at 760.

The defendant pressed recusal pursuant to section 455(a). "The ... language [of section 455(a)] has been interpreted to mean that a judge should recuse himself where a reasonable [person knowing all of the circumstances would harbor doubts concerning the judge's impartiality." Id. at 760. The court noted there were no reasonable grounds upon which a person familiar with the facts would question the impartiality of the trial judge. The court listed several reasons for this conclusion. Among these reasons, the court stated the following:

> [T]here is nothing in this record to warrant the fear that the judge has become so emotionally involved by the disclosures of possible efforts to corrupt that his ability to preside impartially might reasonably be questioned. On the contrary, it appears that defense counsel believed that the judge would be able to preside over the case in an impartial manner for they both readily assented to his decision to hear the case

Id. at 760. As previously stated, at page two of his Reply, Bertoli states "Defendant Bertoli's recusal motion is not based on the claim that Judge Lechner is in fact biased against him." Bertoli Reply Brief at 2 Clearly, "defense counsel believe[] that [I shall] be able to preside over the case in an impartial manner..." Dalfonso, 707 F 2d at 760.

The Circuit noted that important considerations weigh against recusal " Id.

> When the trial judge refused to recuse because of his concern that the recusal, under the circumstances, might set an undesirable precedent, he may have recognized the temptation that such a procedure offered to defendants ready to seize upon any opportunity to avoid trial before a particular judge Id. at 760-761

The Circuit went on to note that potential judge shopping and the problem it caused "was not lost upon the framers of the federal recusal statute." id. at 761. The House Report accompanying the Bill contained the following caution:

> Disqualification for lack of **impartiality must have a** reasonable **basis.** Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

Id. (citing House Report, 1974 USCCAN at 6355) (emphasis in original). As noted: "A decision to recuse in the instant case might encourage false impugnment of the integrity of trial judges as a tactic in future cases." 707 F.2d at 761. Indeed, were the conduct of Bertoli to be accepted and tolerated, it might encourage false attempts as a tactic to disqualify trial judges in future cases.

In Union Carbide Corp. v. U.S. Cuttina Service. Inc., 782 F.2d 710 (7th Cir. 1986), the court determined whether the district judge's refusal to recuse herself because of her husband's ownership of certain stock, during a period of time of the litigation, was an error under section 455(a) and (b). There was a class action against Union Carbide; the class included a number of corporations. It did not come out until a later time that some of the stock owned by the judge's husband (in an IRA) was in companies **which** would be members of the class. Accordingly, after the motion was filed, the district judge stepped out of the case and during this period of time her husband sold the stock, incurred a brokerage fee of $900 and put the proceeds in the mutual fund. The panel found that disqualification was not necessary.

Union Carbide argued that the judge might take it out against them for forcing the sale of the stock by the husband. "Union Carbide's argument is that by having to pay $900 in brokerage fees and giving up potential future appreciation in the value of the stocks, Judge Getzendanner might be sore at Union Carbide: or, at least, that a reasonable person might think she would be sore...." 782 F.2d at 715. The court went on to note: "Union Carbide has failed to present evidence that would enable the financial impact on Judge Getzendanner and her husband of the sale of the stock even to be evaluated." The Circuit rejected the arguments of Union Carbide as baseless:

> Remember that for these purposes the reasonable person is assumed to know all the publicity available facts bearing on the issue of recusal...

Id. at 716. In this regard, the court listed the amount of money made by the judge, the position of her husband in one of the largest law firms, the fact that $900 was less than one percent of the value of the stock and that there would be a fee incurred as soon as there was a decision to turn over the stock.

The significant aspect of Union Carbide is the stress on the rationale that a reasonable person is assumed to know all the publicly available facts. This is important with regard to the Bertoli matter, especially as the substance of the facts in Union Carbide compare to the substance of the facts concerning Bertoli As mentioned, and as a reasonable person is assumed to know, the public facts in this case show the only basis for Bertoli's motion is his conduct Additionally, Bertoli has a demonstrated history of attempting to rid himself of individuals or organizations who or which he considers a threat. See the Goldstein Lawsuit, the Grand Jury Lawsuit, the Lacey/Stern Letter, the Tracy Removal Demand and the Bertoli Recusal Motion.

The weight of authority is against compelling recusal merely by attacking a judge. Cf. United States v. Studley, 783 F.2d 934, 939-940 (9th Cir. 1986) (distributing leaflets against judge, filing suit against him not grounds for disqualification); Dalfonso, 707 F.2d at 761 (no recusal based on telephone call by anonymous informant accusing judge of corruption); Olander, 584 F 2d at 888 (attempt to have judge impeached no sufficient without more to support recusal); United States v Grismore, 564 F 2d 929, 933 (10th Cir 1977) (threatened suits and scurrilous attacks not grounds for recusal), cert denied, 435 U S 954 (1978); United States v Wolfson, 558 F 2d 59, 64 (2d Cir 1977) (defendant's threat to remove judge from bench and letter to New York Times accusing judge in "scheme to frame" defendant not grounds for recusal)[36]

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[36] Defendant cites United States v Cerella, 529 F Supp 1373 (S D Fla 1982) in contravention of this authority however that

In opposition to this considerable authority defendant relies primarily on In re Olson, 20 B.R. 206 (D. Neb. 1982).[37] In that case, defendants accused the bankruptcy judge of conspiracy to set fees in a previous bankruptcy case. Nothing came of the accusations. Nonetheless, after the bankruptcy court denied the recusal motion, the district court on appeal reversed. That court stated:

> The Court is not unsympathetic to the plight of Judge Crawford and other judges

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court in a section of the opinion entitled "Can a Party Achieve Recusal by His Own Conduct?" disavowed such a holding saying

> *The circumstances of this case are unique*: a defendant persists in a plan to kill the sentencing judge, despite a grand jury investigation of his criminal scheme. He is apparently convinced he can "pull off" the murder with impunity despite the fact that law enforcement authorities will continually monitor his activities until he cannot operate illegally The question of whether to permit a wrongdoer to achieve recusal by his own criminal acts *will not be addressed* *specifically* by the court

Id. at 1380 (emphasis added)

[37] Other cases cited by defendant present important factual differences, i.e., the absence of charges by defendant or the judge admitted bias. *See* *Potasheck v port City Constr Co* , 609 F 2d 1101, 1111 (5th Cir 1980), *cert denied*, 449 U S 820 (1980) (recusal required as judge and his father had financial dealings with law firm); *United States v Meyerson*, 677 F Supp 1309, 1315 (S.D.N.Y.1988) (judge admitted actual resentment of attorney's tactics); *Marshall v Georgia Pac. Corp.* , 484 F.Supp. 629, 637 (E.D. Ark 1980) (counsel's charges of racial bias created "displeasure" which "could have affected, at least subconsciously, the court's consideration of his client's cause of action.")

> similarly situated who find their impartiality challenged not for anything they may or may not have done, but because a party is willing to make an accusation (supported or otherwise) to a government official Stated somewhat differently, applied in this fashion, section 455 offers an all too convenient means for a party to choose a judge of his liking
>
> Id. at 211.

The weight of authority and the better reasoning counsel against the adoption of Olson.[38] The Third Circuit has noted the importance of guarding against the use of section 455(a) as a blank check for judge shopping.

> An anonymous telephone call to the FBI or to the judge himself, or a telephone call to the prosecuting attorney by an imposter falsely claiming that an effort was being made to influence or even corrupt the trial judge, might open avenues for judge shopping by impelling the trial judge to recuse we cannot reasonably call into question the impartiality of a presiding judge upon so tenuous a basis as a telephone call, made by a meddler or even

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[38] Bertoli also points to Haas v Pittsburgh Nat. Bank, where the Third Circuit, under an abuse of discretion standard, upheld the district court's recusal because a number of newspaper article's, perhaps by litigants before the judge, had questioned his attitude to class actions and attorney's fee awards. However, the court specifically stated: "We do not hold that a district judge is required to recuse himself under these circumstances. Nor do we reach the question whether a judge may refuse to recuse himself solely because the appearance of unfairness has been created by the improper conduct of the parties or their counsel." 627 F.2d 680.

> an accused, suggesting that the judge might succumb to improper inducements.
>
> * * *
>
> There is no reasonable basis in this record to question the judge's impartiality A decision to recuse in the instant ease might encourage false impugnment of the integrity of the trial judges, a tactic in future cases.

Dalfonso, 707 F 2d at 760-61 (footnote omitted).

In this case it very much appears Bertoli is attempting to use section 455(a) now and has in the past to avoid certain judges Bertoli knew he was the subject of a criminal investigation. In June 1987, after the First Cannistraro Indictment, the Government filed a motion to stay discovery in the related civil case. In that case, an affidavit by Michael J. Cahill, Special Agent FBI, in support of that motion stated:

> [t]he other civil defendants in this action, Monarch, its principal owner, Leo Eisenberg, Richard O. Bertoli and Steven Cloyes, plus others, are primary subjects of the criminal investigation.

Cahill Aff., 4.

Instances of Bertoli's conduct concerning other judges, a United States Attorney, his office and a Grand Jury and its foreman are a matter of record From January 1976 to the spring of 1977 a Federal Grand Jury investigated the demise of Bertoli's brokerage firm Bertoli was aware of this investigation and corresponded with the U S Attorney's office about the matter He threatened and in fact filed the Goldstein Lawsuit; he filed the Grand Jury Lawsuit Bertoli demanded that "Judges Frederick Lacey and Lawrence [presumably Herbert] Stern be indicted and also demanded the removal of Judge Tracy from the SEC hearing concerning Executive Securities

Courts have taken a litigant's record on recusal into account when ruling on section 455(a) motions. See e.g. In Re Martin Trigona, 573 F. Supp. at 1240. The importance of the appearance of impartiality of the federal judiciary is important but it "cannot be advanced so broadly as to permit either the government or a defendant under the guise of a motion to recuse to engage in judge-shopping." United States v Boffa, 513 F Supp 505, 508 (D Del 1981). See also In re Martin-Trigona, 573 F Supp at 1243 There are sound policy reasons for refusing to allow mere accusations against a judge require his recusal.

In Studley, the Ninth Circuit ruled that accusations the trial judge "knew that Internal Revenue Services (IRS) agents had perjured themselves, but did nothing did not warrant recusal 783 F 2d at 939 These accusations are similar to Bertoli's accusations that I failed to discipline the prosecutor in Cannisstraro.[39] In Studley the court stated such allegations were "not extra judicial because they involve the judge's performance while presiding over her case n Id The actions taken or not taken in the First Cannistraro Indictment are judicial in nature. An appearance of partiality cannot arise whenever a spectator expresses disagreement with the court's handling of an action.

Nothing in the record shows ill will on my part toward Bertoli, nor has anything been shown to demonstrate emotional involvement. Most significantly, the "important considerations" referred to by the Dalfonso court militate against recusal 707 F.2d at 760. In the case sub judice there have been no allegations that naything I have done or said points to extra judicial

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[39] "Judge Lechner knowing the history of lies in the Cannistraro matter ... accepted these false statements..." Bertoli Amended Brief, Exhibit B at 3.

prejudice toward Bertoli. The record discloses only actions by Bertoli. Any remarks made by him were made in a fit of pique years ago. A reasonable person knowing all the circumstances in this matter would not question my impartiality as to either Bertoli or Cannistraro. There is, therefore, neither reason nor basis to effect my recusal in this case

Conclusion

Because neither Bertoli nor Cannistraro has shown the appearance of bias or prejudice, and for the foregoing reasons, the motions for recusal are denied The Government is to submit an appropriate form of order.

Dated 20 March 1990

(2)

Supreme Court, U.S.
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No. 92-1917

In the Supreme Court of the United States

OCTOBER TERM, 1993

RICHARD O. BERTOLI, PETITIONER

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in denying petitioner's petition for a writ of mandamus seeking to compel a district judge to recuse himself under 28 U.S.C. 455(a), which requires recusal when a judge's impartiality might reasonably be questioned.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1993. The petition for a writ of certiorari was filed on May 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the District of New Jersey on charges of conducting an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); conspiring to obstruct justice, in violation of 18 U.S.C. 371; and obstructing justice, in violation of 18 U.S.C. 1503. The indictment alleged that together with Richard Cannistraro and Leo Eisenberg, petitioner conducted the affairs of a securities brokerage firm, Monarch Funding Corp., through a pattern of racketeering activity involving a variety of fraudulent securities trading practices and obstruction of justice. According to the indictment, petitioner and his co-conspirators prepared and distributed or caused to be distributed false and misleading research reports recommending purchase of the stock of various companies in order to inflate the price of that stock after they had previously purchased the stock for their own benefit. In addition, the indictment alleged that, through perjury, subornation of perjury, and destruction and concealment of evidence, petitioner and his co-conspirators attempted to obstruct justice in connection with civil and criminal investigations of their activities. Second Superseding Indictment, Count 1 ¶¶ 10-73; *id.*, Count 3 ¶¶ 14-28.

1. On November 2, 1989, petitioner filed a motion to recuse the district judge assigned to this case. Pet. App. 28a. In that motion, petitioner contended that animosity existed between the judge and himself as a result of letters that petitioner had written to the judge, to former Justice Thurgood Marshall, and to others disparaging the judge for the sentence he imposed on petitioner's co-defendant, Richard Cannistraro, after Cannistraro pleaded guilty in another criminal case. Pet. App. 38a, 40a-41a.

The district court denied the motion. Pet. App. 27a-97a. The judge explained that "[n]othing in the record shows ill will on my part toward [petitioner], nor has anything been shown to demonstrate emotional involvement." *Id.* at 96a. Although the judge declined to so find, he noted that a reasonable person could conclude, based on the facts and circumstances giving rise to the recusal motion, that petitioner's letters were part of a "calculated plan seeking to have me disqualified in the event [petitioner] would be indicted in a case assigned to me." *Id.* at 42a n.19.

After the denial of the recusal motion, petitioner sought to compel the judge's recusal by filing a petition for a writ of mandamus in the court of appeals. The court of appeals denied the petition. Pet. 6.

2. Prior to trial, petitioner, who was proceeding *pro se*, requested 50 blank trial subpoenas from the district court. The court ruled that petitioner would be permitted to obtain the subpoenas only if he provided a statement with respect to each subpoena explaining the relevance and necessity of the evidence sought; explaining why, in the case of documents, the evidence was not otherwise procurable by the exercise of due diligence; and showing that the request was made in good faith and not for the purpose of delay. Pet. C.A. Br., Exh. D, at 5-6. In imposing that requirement, the court recognized that "Fed. R. Crim. P. 17 provides for the issuance of trial subpoenas on request of a party." *Id.* at 1. The court concluded, however, that "[s]uch justification appears to be necessary in the interests of avoiding the presentation of cumulative, repetitive and/or irrelevant testimony at trial, given the history in this case

of pushing discovery and motion practice to unnecessary extremes." *Id.* at 2.[1] The court added (*id.* at 6):

> In a case of this magnitude, a court has an obligation to control the proceedings. The size of the task which confronts the court and the parties requires pre-trial efforts to organize the presentation of such a potentially large mass of evidence in the most efficient manner possible. Succinctly stated, a trial court, in a case such as this, must insist upon specificity concerning potential evidentiary issues before allowing a massive factual controversy to proceed. The above directives have been formulated with this in mind.

Both petitioner and the government took issue with the district court's requirement of a threshold showing for the issuance of defense subpoenas. Pet. C.A. Br., Exh. E, at 1-2; *id.*, Exh. F, at 18-20. In response, the court expressed concern that, on the day of trial, with a jury sitting, it would be confronted "with 50 people walking in with 50 motions to quash a subpoena." *Id.* at 19. Nevertheless, the court indicated that it would be willing to vacate the order "if there is a better way." *Id.* at 20.

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[1] The court noted that petitioner had previously requested 24 subpoenas duces tecum seeking documents from more than 250 individuals and entities, and had filed 22 motions and three letter requests consisting of 1,080 pages of briefs and affidavits and 2,115 pages of exhibits. Pet. C.A. Br., Exh. D, at 2, 3. Among the entities that petitioner had previously sought to subpoena were the Manhattan District Attorney's office, for various investigative files; the CIA, for records relating to him and two other individuals; the Boston law firm of Choate, Hall & Stewart, for records relating to a sexual harassment case brought by a former SEC employee in Washington; the Defense Department, for records relating to all sites under Defense Department control that have been contaminated by toxic substances; the Commerce Department, for nine months of visitor logs for the Economic Development Administration; and the IRS, for three years of tax returns for 15 individuals. See May 6, 1992, Letter-Opinion at 4-7; April 6, 1992, Gov't Letter Br. at 7-9; March 20, 1992, Gov't Letter Br. at 4 n.4.

Thereafter, the government proposed an alternative procedure for avoiding disruption or delay of the trial as a result of the defense subpoenas. Under the government's proposal, each subpoena *duces tecum* issued by the defense would include a cover letter to the recipient from the court summarizing the charges against the defendants, requiring that motions to quash be filed well in advance of trial according to a specified schedule, informing recipients that they could comply with the subpoena prior to trial if they so wished, and inviting the recipients to contact either the government or the defendant issuing the subpoena if they had any question concerning the charges or wanted a copy of the indictment. Pet. C.A. Br., Exh. H, at 3-4 & attachment.

Over petitioner's objection, the district court accepted the government's proposal and, on December 7, 1992, provided the parties with a copy of the cover letter. Pet. C.A. Br., Exh. N, at 2 & attachment. In response to petitioner's complaint that the government's proposed cover letter would result in disclosure of his defense to the government (Pet. C.A. Br., Exh. K), the court rejected the government's suggestion that the letter invite subpoena recipients to call the government if they had any questions or wanted a copy of the indictment. Instead, the letter invited recipients to contact the issuing defendant with any questions. Pet. C.A. Br., Exh. N, attachment.

Although the cover letter prepared by the district court specified January 11, 1993, as the due date for motions to quash, petitioner did not serve any subpoenas before that date. At a hearing on January 12, 1993, the court directed that the parties specify May 3, 1993, as the return date for all trial subpoenas and told petitioner that he could obtain blank trial subpoenas from the clerk's office. Pet. C.A. Br., Exh. P, at 8, 12. The court did not specifically direct petitioner to attach the cover letter to those subpoenas, nor did the court revise the cover letter's now-expired due date for motions to quash. At the same hearing, petitioner renewed his earlier motion requesting the district judge to disqualify himself "based upon not only the appearance of prejudice but actual prejudice." The court denied the motion. *Id.* at 10; Pet. App. 11a; see also Pet. C.A. Br., Exh. O, at 2.

3. Thereafter, petitioner filed a petition for a writ of mandamus with the court of appeals seeking to compel the district judge to (1) rescind the cover-letter requirement and (2) disqualify himself because his actions concerning the defense subpoenas created the appearance of bias. While the mandamus petition was pending, the government asked the district court to clarify whether the cover letter requirement was still in effect, given the court's failure to reimpose the requirement at the January 12 hearing. The court responded that "[d]efendants are permitted to serve trial subpoenas *duces tecum*, returnable 3 May 1993, without enclosure of any cover letter." District Court's Letter of Feb. 23, 1993.

In light of the district court's ruling, petitioner informed the court of appeals that "[t]he district judge's withdrawal of the cover letter requirement moots our first ground for mandamus. It in no way moots the second [*i.e.*, the recusal issue]." Pet. Letter of March 1, 1993. On April 16, 1993, the court of appeals denied the petition for mandamus without opinion.

ARGUMENT

Petitioner contends that he was entitled to a writ of mandamus compelling the district judge to recuse himself. Under 28 U.S.C. 455(a), on which petitioner apparently relies (see Pet. 16), a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Petitioner argues that disqualification was appropriate here because of the judge's imposition of the cover-letter requirement, his earlier order requiring a threshold showing for the issuance of defense subpoenas, and the comments the judge made about petitioner's co-defendant at the sentencing hearing in a prior case. Petitioner's fact-bound claim does not merit review, and in any event the court of appeals correctly denied the mandamus petition.[2]

The district judge's initial imposition of the cover-letter and threshold-showing requirements provides no basis for disqualification. The record clearly demonstrates that the judge did not take those actions out of personal pique or in a deliberate attempt to disadvantage petitioner; rather, his obvious purpose was to avoid being inundated, at the commencement of an otherwise complex trial, with a flood of motions to quash petitioner's 50 subpoenas, which he feared might have a seriously disruptive impact on the proceedings. The judge's fears, moreover, were not merely speculative; petitioner had already demonstrated through his previous discovery practice a proclivity for issuing extremely broad and seemingly irrelevant requests for documents. See note 1, *supra.*

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[2] The courts of appeals have uniformly held that mandamus is a proper means for obtaining review of a district judge's refusal to recuse himself under Section 455(a). See, *e.g.*, *In re School Asbestos Litigation*, 977 F.2d 764, 774-778 (3d Cir. 1992); *In re United States*, 666 F.2d 690, 694 (1st Cir. 1981); *In re International Business Machines*, 618 F.2d 923, 926-927 (2d Cir. 1980); *SCA Services, Inc.* v. *Morgan*, 557 F.2d 110, 117-118 (7th Cir. 1977). Accordingly, for purposes of this brief, we do not contend that petitioner's claim could not be raised through a petition for mandamus.

In any event, the district judge eventually reconsidered his attempt to regulate the subpoena process, withdrew the threshold-showing and cover-letter requirements, and permitted petitioner to issue his subpoenas without restriction. Even if the judge's initial efforts at regulation were misguided, there is no reason to believe that they were made in bad faith.[3] As petitioner concedes (Pet. 22), a judge's errors of law, standing alone, do not require disqualification. See, *e.g.*, *United States* v. *Sammons*, 918 F.2d 592, 599 (6th Cir. 1990); *United States* v. *Nelson*, 718 F.2d 315, 321 (9th Cir. 1983).[4]

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[3] To the contrary, before removing the cover-letter requirement altogether, the judge revised the cover letter proposed by the government in order to protect petitioner from any prejudice arising from the letter.

[4] Petitioner makes much of the fact that the judge imposed the cover letter requirement solely on the defendants. Pet. 22. It was petitioner's discovery practice, however, and not the government's, that posed the threat of a flood of motions to quash. Accordingly, the judge's action had a reasonable justification and did not reflect bias.

In order to establish that the judge's actions in connection with the subpoenas were motivated by bias, petitioner cites (Pet. 23-24) comments made by the judge in sentencing Richard Cannistraro, petitioner's co-defendant, in a separate case nearly two years before the return of the indictment in this case. The judge stated at that time that the only distinction between Cannistraro and a bank robber was "the absence of a weapon"; that Cannistraro had demonstrated "no shame"; that his "bottom line was avarice"; and that the decision to sentence Cannistraro to a prison term was not "heart wrenching" or a "close call." Those comments directed to Cannistraro do not reflect animosity against petitioner; petitioner cites nothing to suggest that the judge prejudged petitioner's case as a result of the Cannistraro prosecution.

Moreover, sentencing judges are supposed to make moral judgments about defendants and their crimes, and the judge's remarks concerning Cannistraro were typical of the comments judges make at sentencing. If such remarks were sufficient to disqualify a judge from hearing future cases involving the same defendant or a co-conspirator, the judicial system would break down in many districts. As the court of appeals observed in *United States* v. *Cowden*, 545 F.2d 257, 266 (1st Cir. 1976), cert. denied, 430 U.S. 909 (1977), "the judicial system could not function if judges could deal but once in their lifetime with a given defendant, or had to withdraw from a case whenever they had presided in a related or companion case or in a separate trial in the same case." See also

United States v. *Archbold-Newball*, 554 F.2d 665, 682 (5th Cir.), cert. denied, 434 U.S. 1000 (1977).[5]

There is no reason for the Court to hold this case pending its decision in *Liteky* v. *United States*, cert. granted (May 24, 1993) (No. 92-6921). The issue in *Liteky* is whether the appearance of bias necessitating disqualification under Section 455(a) must derive from an extrajudicial source. Although the Third Circuit recognizes a distinction between judicial and extrajudicial bias in applying Section 455(a), see *Johnson* v. *Trueblood*, 629 F.2d 287, 290-291 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981), neither the district court nor the court of appeals expressly relied on that distinction in denying petitioner's recusal motion, and thus there is no basis for concluding that this case presents the question at issue in *Liteky*. Even if the Court in *Liteky* were to reject the extrajudicial-source requirement and hold that recusal is required when the appearance of bias arises out of judicial proceedings, the outcome in this case would not change. As discussed above, the judge's actions in connection with the defense subpoenas did not raise a reasonable question of bias so as to require his disqualification.

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[5] Although he does not discuss the matter in the text of his petition, petitioner suggests in the "Questions Presented" portion of his petition that the judge was biased because of petitioner's disparaging comments, made before the return of the instant indictment, about the judge's handling of Cannistraro's sentencing—an argument that was rejected by the court of appeals when it denied petitioner's previous mandamus petition in this case. Even if petitioner had properly raised this question in the body of his petition for certiorari (see Sup. Ct. R. 14.1(j)), it would not merit review. A defendant may not obtain disqualification of a judge based on his own hostile comments about the judge. See *United States* v. *Studley*, 783 F.2d 934, 939-940 (9th Cir. 1986). If that were the case, then defendants would be able to manipulate the system in order to pick their own judges. Indeed, the district judge indicated that that may have been precisely what petitioner was trying to do through his disparaging comments; the judge noted the existence of evidence suggesting that petitioner had pursued a similar strategy with respect to other judges in earlier proceedings. Pet. App. 42a-46a & n.19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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